Supreme Court, U.S.
FILED
96 656 OCT 25 1996
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE HOME BUILDERS ASSOCIATION OF VIRGINIA AND THE HOME BUILDERS ASSOCIATION OF RICHMOND,

Petitioners,

v.

CHESTERFIELD COUNTY, VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

May the United States Court of Appeals for the Fourth Circuit nullify this Court's decision in *Dolan v. Tigard*, 114 S.Ct. 2309 (1994) which held that when government conditions land use upon the receipt of dedications from the property owner, those dedications must be "roughly proportional" to the projected impact of the proposed land use upon existing public services and infrastructure?

Specifically,

a) In *Dolan*, this Court clearly mandated that where government conditions land use upon the receipt of dedications by the property owner, it is the government's burden to demonstrate that the dedications are "roughly proportional" to the proposed use's projected impact upon existing public infrastructure and services through an "individualized determination." May the United States Court of Appeals for the Fourth Circuit dismiss this Court's mandated requirements simply because in its judgment an "individualized determination" is not "required under the Constitution" or "feasible in practice"?

b) In arriving at its decision in *Dolan*, this Court differentiated between cases where government employed its public health, safety and welfare powers to classify areas as to land use (i.e. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)) and those instances when government conditioned land use upon the receipt of dedications from the property owner (*Dolan*). In cases such as the instant action, may courts refuse to apply the *Dolan* standard of review and, instead, continue to rely upon the *Agins* standard of review?

II

When this Court has stated that the Fifth Amendment is as much a part of the Bill of Rights as the First and Fourth Amendments, should not a more stringent standard of review be applied to cases involving government action impinging upon the people's Fifth Amendment rights?

III

Did both the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Eastern District of Virginia err in upholding the Chesterfield County, Virginia Official Cash Proffer Policy when the Policy fails to conform to, and, indeed, is violative of, *Dolan*'s standards?

Specifically,

a) May Chesterfield County condition land use upon the payment of cash and real property dedications where the cash payments and real property dedications are not "roughly proportional" to the proposed land use's projected impact upon existing public infrastructure and services?

b) May Chesterfield County refuse to conduct individual determinations when it requires dedications as a condition of land use in order to demonstrate that the required dedications are "roughly proportional"?

c) May Chesterfield County "bank" dedications exacted from property owners as a condition of land use in order to implement its Capital Improvement Program for future countywide use?

PARTIES TO THE PROCEEDING

Petitioners—the National Association of Home Builders of the United States ("NAHB"), the Home Builders Association of Virginia ("HBAV") and the Home Builders Association of Richmond ("HBAR")—are affiliated not-for-profit trade organizations.[1] Petitioners represent the interests of the building and construction industry. In this action, Petitioners are specifically representing the interests of its many members who are involved in the construction of residential homes in Chesterfield County, Virginia. These members are required to pay cash and to dedicate real property to Respondent Chesterfield County as a condition of favorable action on their residential rezoning applications.

Respondent Chesterfield County, Virginia is a political subdivision of the Commonwealth of Virginia. Chesterfield County adopted and administers its Official Cash Proffer Policy ("Policy") which is the subject of this action. The Policy requires Petitioners' members to pay cash and to dedicate real property to Chesterfield County as a condition for the right to construct residential housing.

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[1] Petitioners have no parent companies or nonwholly owned subsidiaries. Lists of Petitioners' members were provided to the Clerk of the United States Court of Appeals for the Fourth Circuit.

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CHESTERFIELD COUNTY, VIRGINIA,

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PETITION FOR WRIT OF CERTIORARI

The National Association of Home Builders of the United States, the Home Builders Association of Virginia and the Home Builders Association of Richmond respectfully seek certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit ("Opinion"), unpublished, is reproduced as Appendix A1-A7. The Opinion affirms the November 29, 1995 decision of the United States District Court for the Eastern District of Virginia, published at 907 F. Supp. 166, and reproduced at Appendix B1-B4.

JURISDICTION

This is an action for declaratory and injunctive relief. Specifically, Petitioners contend that Chesterfield County's

Policy is facially invalid in violation of the United States Constitution, Amendments Five and Fourteen. The United States District Court for the Eastern District of Virginia maintained jurisdiction over this action pursuant to the provisions of 28 U.S.C. §§ 1331, 2201 and 2202. The Petitioners appealed to the United States Court of Appeals for the Fourth Circuit pursuant to the provisions of 28 U.S.C. § 1291.

The United States Court of Appeals for the Fourth Circuit entered its judgment on July 30, 1996. This Court maintains jurisdiction pursuant to the provisions of 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment Five:

> . . . nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment Fourteen:

> Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law.

Chesterfield County's official Cash Proffer Policy—the subject of this action—is reproduced herein as Appendix C1-C5.

STATEMENT OF THE CASE

A. Factual Background

The Policy is nothing more than an impact fee. It is "applicable to all residential rezoning requests."[1] The Policy functions to exact monies and real property from residential rezoning applicants—typically builders and developers—in order to pay for the construction of new public facilities such

[1] Appendix ("App."), C3.

as schools, roads, parks, libraries and fire stations.[2] Chesterfield County's implementation of the Policy assumes that all other tax revenues are required for the operating costs of county government, "but that there is nothing left over to pay for the cost of capital facilities. . . ."[3]

The dedications required by Chesterfield County vary; actual cash proffers and real property dedications required by the Policy are calculated based upon generalized components,[4] using "Countywide averages."[5] Chesterfield County makes no individualized determinations, but rather relies upon a generic study conducted years ago to assess the alleged costs of new housing generally.

According to the Policy's terms, collected "[c]ash proffers must be used to fund projects in the [Chesterfield County] Capital Improvement Program."[6] Cash proffers not used for intended purposes within 15 years of receipt will be returned."[7]

B. Procedural Background

1. The District Court

NAHB, HBAV and HBAR filed their original Complaint for Declaratory Order and Injunctive Relief on May 22, 1995. The Complaint alleged that Chesterfield County's Policy was facially invalid, in violation of the United States Constitution, Amendments Five and Fourteen. Specifically, the Complaint alleged that the Policy—which requires dedications of

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[2] App., C3.

[3] App., C1.

[4] App., C1-C2.

[5] App., Cl. During fiscal year 1995, the so-called "maximum cash proffer amount" was $5,083.00 per residential building lot. App., C5. This amount has now increased twice based upon an automatic indexed formula incorporated into the Policy. App., C5.

[6] App., C3.

[7] App., C5.

cash and land as a condition of land use—violated this Court's standard enunciated in *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

The violation consists of Chesterfield County's failure to conduct "individualized determination[s]" in order to determine the impact of a proposed residential development prior to exacting cash and land from the developer. As this Court noted in *Dolan*, absent the "individualized determination", there can be no showing that the Policy's required dedications are "roughly proportional" to the proposed development's impact on existing public services and infrastructure.[8]

The District Court initially dismissed the original Complaint for lack of subject matter jurisdiction. Thereafter, the District Court allowed the filing of the Plaintiffs' First Amended Complaint for Declaratory Order and Injunctive Relief on August 1, 1995. On November 27, 1995, the District Court considered the parties' cross-motions for summary judgment. The District Court entered its Final Order on November 29, 1995, denying Plaintiffs' requested relief.

The District Court's Final Order declined to apply the *Dolan* test to this case challenging the Policy.[9] Moreover, the District Court applied the standard of review enunciated in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) to determine the Policy's validity.[10] The District Court concluded that the Policy was facially valid and that even if *Dolan* did apply, the Policy was capable of being applied consistent with *Dolan*.[11] The District Court's reasoning was that there was nothing in

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[8] *Dolan*, 114 S.Ct. at 2319-20.

[9] App., A7.

[10] App., A3-A4.

[11] Id.

the Policy which prevented Chesterfield County from making an "individualized determination" in order to demonstrate the "rough proportionality" of the required dedications.[12]

NAHB, HBAV and HBAR appealed the District Court's Final Order on December 20, 1995.

2. The Circuit Court

On July 30, 1996, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision, largely adopting the District Court's reasoning.[13] Like the District Court, the Circuit Court applied the *Agins* standard of review as opposed to the *Dolan* standard of review in evaluating the Policy's validity.[14] The Circuit Court went further, however, rejecting *Dolan's* "individualized determination" requirement.[15] The Circuit Court likened the "individualized determination" requirement to an "exact proportionality" standard, which it stated was "not required under the Constitution, nor feasible in practice."[16]

This Petition for Writ of Certiorari is timely, having been filed on October 25, 1996. Petitioners seek this Court's review of the Circuit Court's decision which radically departs from, and, indeed, repudiates, this Court's controlling precedent.

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[12] *App., A3-A4.* Notably, the District Court did not find that Chesterfield County conducted "individualized determination[s]" or that the Policy provided for, or required, an "individualized determination." Indeed, Chesterfield County does not conduct, nor does the Policy require, "individualized determination[s]" when dedications are required as a condition of the use of property.

[13] App., B4.

[14] App., B3.

[15] App., B4.

[16] *Id.*

SUMMARY OF REASONS WHY THE WRIT SHOULD ISSUE

First, the writ should issue because this Court needs to exercise its supervisory power in order to correct the Fourth Circuit's radical departure from, and blatant repudiation of, this Court's precedent, as well as the Fourth Circuit's sanctioning of the District Court's refusal to apply this Court's precedent. Despite this Court's clarity with respect to the standards applicable to instances where government conditions land use upon dedications, the Fourth Circuit substituted its judgment, dismissing this Court's precedent.

Second, there is some conflict and confusion below as to other aspects of this Court's Fifth Amendment jurisprudence. There is a large gap for this Court to fill with respect to the applicable standard of review for *Dolan* type cases. There is also conflict and confusion on the application of *Dolan* to legislative actions and to monetary dedications. Clarification by this Court is required in order to provide the necessary guidance to ensure the consistent protection of the people's Fifth Amendment rights.

Third, and finally, the Policy violates the United States Constitution. Unless property owners agree to pay for the construction of capital facilities in Chesterfield County—irrespective of any need created by a proposed development—Chesterfield County will use its zoning powers to deny the use of the land. In other words, these property owners are required to bear the brunt of providing the entire Chesterfield County population with public facilities. This requirement contravenes the principal purpose of the Fifth Amendment's Takings Clause which is "to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

REASONS WHY THE WRIT SHOULD ISSUE

A. CERTIORARI SHOULD BE GRANTED TO CORRECT THE FOURTH CIRCUIT'S DEFIANCE OF THIS COURT'S MANDATE

When government requires dedications of a property owner as a condition for the otherwise lawful use of his property, the dedications must be "roughly proportional" to the projected impact of the proposed use. The government bears the burden of demonstrating that the dedications are "roughly proportional" by conducting an "individualized determination" of the proposed land use's impact upon existing public infrastructure and services. This requirement is the mandate of this Court's decision in *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

While the Court's *Dolan* decision is clear and straightforward in its reasoning, the United States Court of Appeals for the Fourth Circuit has failed to comprehend its meaning. Indeed, the Fourth Circuit's opinion repudiates this Court's mandate as being beyond the United States Constitution's requirements. This Court should grant certiorari in order to correct this impudence.

1. The Fourth Circuit Rejects This Court's Clear Mandate

The Fourth Circuit's refusal to properly apply *Dolan* to the Chesterfield County Policy is inexplicable.[17] First, the Fourth Circuit flatly rejects this Court's mandate with respect to the "individualized determination" requirement.[18] According to the Fourth Circuit, the "individualized determination" requirement "clearly is not required under

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[17] The District Court's refusal to apply *Dolan* is equally baffling. The *Dolan* decision, the Plaintiffs' initial pleadings, the Policy's language—all point to the application of *Dolan* in this action.

[18] App., B4.

the Constitution"—despite *Dolan's* finding to the contrary—"nor feasible in practice."[19]

Second, the Fourth Circuit misreads *Dolan's* import by applying the *Agins* standard of review.[20] *See Agins v. Tiburon*, 447 U.S. 255, 260 (1980). This Court has clearly differentiated *Dolan* type cases from *Agins* type cases. *Dolan*, 114 S.Ct. at 2316-17. The *Agins* standard is not applicable to *Dolan* cases for the simple reason that *Agins* involved an entirely different legal question than that presented in *Dolan*. *Agins* involved broad classifications of land—zoning—while *Dolan*, as in this case, involved the requirement of dedications as a condition of land use. As discussed more fully below, this Court should take this opportunity to clarify the appropriate standard of review for *Dolan* type cases.

The sum of the Fourth Circuit's defiance and misapplication of *Dolan* is that the Fourth Circuit incorrectly found that the Policy was constitutionally sound. In fact, the Policy is nothing more than "an out-and-out extortion whereby developers are required to pay for the privilege of using their land for valid and reasonable purposes. . . ." *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14 (N.H. 1981) (town zoning regulation requiring property dedications as condition of subdivision approval held unconstitutional).[21] And, as discussed below, similar to the situation in *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W. 2d 297 (1980), the Policy is a method by which Chesterfield County "banks" cash and land exacted from developers in order to pay for

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[19] App., B4. Indeed, at the July 8 hearing, Circuit Judges Russell and Widener expressed their disdain for this Court's *Dolan* decision by flatly stating that the "individualized determination" requirement was "stupid".

[20] App., B3.

[21] It is hard to imagine a more valid, reasonable and American use of land than the construction of homes.

future public improvements.[22] There is no justification for this sort of funding scheme which forces a disfavored few to pay for the benefit of the many while allowing elected public officials to avoid the riskier course of raising taxes.

2. "Individualized Determinations" Do Not Equate With "Exact Proportionality"

The Fourth Circuit rationalized its rejection of this Court's "individualized determination" requirement by claiming that the requirement approaches "exact proportionality."[23] Semantics aside, the Fourth Circuit's rationalization overlooks the factual predicate of the *Dolan* decision.

In *Dolan*, the city of Tigard developed and codified a comprehensive plan governing development in its Central Business District.[24] Tigard also conducted a separate transportation study as well as developing a Master Drainage Plan and a Park Plan.[25] Thereafter, when Mrs. Dolan submitted her building permit application, Tigard evaluated her application based upon these plans.[26] Tigard's evaluation made the following findings to justify its dedication requirements:

1) it is reasonable to assume that customers and employees could use the pedestrian/bicycle path;

2) the pedestrian/bicycle path could offset some of the expected traffic congestion;

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[22] This Court discussed the *Simpson* case at length in *Dolan*, relying upon its reasoning to arrive at the "roughly proportional" standard. *Dolan*, 114 S.Ct. at 2319.

[23] App., B4.

[24] *Dolan*, 114 S.Ct. at 2313.

[25] *Id.*

[26] *Id.* In contrast to Tigard's multiple plans, Chesterfield County applies its one "one-size-fits-all" study, which allegedly assesses the costs of housing generally.

3) there is a reasonable relationship between the proposed development and the Greenway dedication requirement; and,

4) there is a reasonable relationship between alleviating traffic and the proposed pedestrian/bicycle path.[27]

Despite Tigard's multiple studies, its application of these studies to Mrs. Dolan's application, and its formal findings, this Court found Tigard's justification for seeking dedications as a condition of the issuance of a building permit to be inadequate.[28]

Comparatively speaking, the Policy's generic study does not even meet the specificity of Tigard's studies, much less this Court's constitutional standards. Clearly, if Tigard must make "more stringent individual determinations", Chesterfield County should not be allowed to simply plug numbers into its general and generic formula. If *Dolan* means anything, it means that "one size does [*not*] fit all" when government conditions land use upon the receipt of dedications.

B. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE STANDARD OF REVIEW TO BE APPLIED TO *DOLAN* CHALLENGES

1. The *Agins* Standard Of Review Is Inappropriate To *Dolan* Challenges

The Fourth Circuit held that the Policy was invalid "only if it denies a property owner economically viable use of his land or fails to advance legitimate state interests."[29] That standard of review—the *Agins* standard—is incorrect and inapplicable to *Dolan* challenges. This Court went to some

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[27] *Dolan*, 114 S.Ct. at 2314-15.

[28] *Dolan*, 114 S.Ct. at 2321.

[29] App., B3, citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

lengths in *Dolan* to distinguish that case from *Agins*.[30] Indeed, under the facts of *Dolan*, the application of the *Agins* standard of review would have rendered a decision in favor of Tigard, since the permit conditions did not deprive Mrs. Dolan of the economically beneficial use of her property and the permit conditions did advance legitimate state interests.[31]

This Court explained the differences between *Agins* and *Dolan* by noting that *Agins* involved zoning limitations on the use of property, while *Dolan* concerned the requirement that Mrs. Dolan dedicate property as a condition of land use.[32] The differences present in *Dolan* are also present in this action. The Policy does not serve to classify areas of Chesterfield County as to appropriate use (i.e. residential, commercial, industrial, etc.). Rather, the Policy denies residential zoning to agricultural land unless the rezoning applicant agrees to pay cash and to dedicate land to Chesterfield County. An applicant must thus pay in order to make the best use of his land.[33]

2. The Same Deference Given First Amendment Challenges Should Be Afforded To Fifth Amendment Challenges

This Court has stated that the Fifth Amendment is "as much a part of the Bill of Rights as the First Amendment . . . ;" it "should [not] be relegated to the status of poor relation. . . ." *Dolan*, 114 S.Ct. at 2320. Based upon that reasoning, its seems logical that the standard of review

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[30] *Dolan*, 114 S.Ct. at 2316.

[31] *Thus, Agins* cannot have any application to cases where government conditions land use upon the receipt of dedications from the property owner.

[32] *Dolan*, 114 S.Ct. at 2316.

[33] As opposed to *Agins* where the zoning ordinance aimed at maximizing open spaces did not prevent residential construction. *Agins*, 447 U.S. at 262.

applicable to First Amendment challenges should also be applicable to Fifth Amendment challenges.[34]

"When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest." *Federal Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 256 (1986) (federal election statute held unconstitutional as applied to organization due to lack of compelling state interest) (citations omitted). Moreover, "[i]t is not enough to show that the Government's ends are compelling, the means must be carefully tailored to achieve those ends." *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (federal statute banning indecent telephone messages held unconstitutional because it was insufficiently narrow to address a compelling state interest.) Government may pursue legitimate and compelling state interests, but where government action impinges upon constitutionally protected rights, " 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with . . . [constitutionally protected] freedoms. . . .' " *Sable Communications*, 492 U.S. at 126.

There is no reason—logically or constitutionally speaking—why courts should not apply this same stringent standard of review to government actions which impinge upon the people's Fifth Amendment rights. This Court has already stated the obvious—that the Fifth Amendment is as much part of the Bill of Rights as the First Amendment. This case now provides this Court with the opportunity to provide the

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[34] This logic is merely an extension of the expansive trend of this Court's property rights jurisprudence. Since 1987, beginning with *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) wherein this Court held that property owners must be compensated for temporary takings, this Court has since consistently expanded the concept of property rights. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan*, 114 S.Ct. 2309 (1994).

lower courts with badly needed direction for the proper resolution of *Dolan* type Fifth Amendment challenges.

3. This Court Should Clarify That *Dolan* Is Applicable To Legislative Actions And To Monetary Exactions

The resistance to *Dolan* is not confined to the Fourth Circuit or the Eastern District of Virginia. Many courts throughout the county have sought to limit or neuter *Dolan*, while other courts have attempted to fairly apply *Dolan* to government actions which burden Fifth Amendment rights. For example, many courts have declined to apply *Dolan* to legislative "takings", while others have agreed with the wisdom of Justices Thomas and O'Connor who have stated:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can.

Parking Association of Georgia, Inc. v. City of Atlanta, 115 S.Ct. 2268 (1995) (Thomas, J. and O'Connor, J. dissenting).[35]

Similarly, some courts have recognized *Dolan*'s applicability to monetary exactions, while other courts deny *Dolan's*

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[35] For example, in *Ehrlich v. City of Culver City*, 911 P.2d 429 (Calif. 1996), *Home Builders Association of Central Arizona v. City of Scottsdale*, 902 P.2d 1347 (Ariz. 1995), *Parking Association of Georgia, Inc. v. City of Atlanta*, 450 S.E. 2d 200 (Ga. 1994), and *Harris v. City of Wichita*, 862 F. Supp. 287 (D. Kan. 1994), the various courts declined to apply *Dolan* to legislative actions. By contrast, the courts in *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E. 2d 384 (Ill. 1995), *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360 (Or. 1994), and *Trimen Development Co. v. King County*, 877 P.2d 187 (Wash. 1994) have all held that *Dolan* is applicable to legislative actions.

applicability.[36] This Court's intervention through the review of this case would serve to resolve the conflicts.[37]

C. THE POLICY VIOLATES THE CONSTITUTION

The Policy falls far short of *Dolan's* requirements.[38] There can be no evaluation as to the "rough proportionality" of the Policy's dedication requirements since Chesterfield County fails to conduct the mandated "individualized determination[s]." There are *no* determinations as to any specific development's impact on existing public infrastructure or services—if any.[39]

1. The Policy Contains No Loopholes

The Policy is facially invalid. There are no circumstances under which it could be applied consistent with the constitutional requirements this Court set forth in *Dolan*.

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[36] *See Ehrlich v. City of Culver City*, 911 P.2d 429 (Calif. 1996) (*Dolan* applied to monetary exaction). *Cf. McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995) (*Dolan* not applicable to monetary exactions); *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995) (same).

[37] The Policy is the official adopted action of the Chesterfield County Board of Supervisors—a legislative body. And, as previously noted, the primary exaction required under the Policy is money.

[38] The Policy rejects the "rough proportionality" standard in its very first paragraph wherein it identifies one of its "[u]nderlying [a]ssumptions" as being that it "must only meet a 'reasonableness' test, that there must be some rationale for the approach chosen. . . ." App., Cl. This is the very same test applied by the Oregon Supreme Court and rejected by this Court in *Dolan*. *See Dolan*, 114 S.Ct. at 2320-23. Indeed, under this Court's precedents, there must be an "essential nexus"—not a relationship—between a "legitimate state interest" and the cash and land dedications required by the Policy. *Nollan*, 483 U.S. at 837.

[39] It is highly probable that some residential projects would have *no* impact upon existing public infrastructure and services.

a. The Policy is mandatory and universally applied to residential rezoning applications

The Policy clearly states that "[c]ash proffers *will* be applicable to all residential rezoning requests."[40] In other words, all applicants—irrespective of any need generated by their development—will pay monies and/or dedicate land to Chesterfield County.[41] The amount paid may not necessarily be the maximum, but some amount shall be paid if the applicant wishes to develop his land.[42]

b. Cash proffers are not based upon any "individualized determination"

The Policy relies upon countywide averages "to determine the cost per dwelling unit of a public facility."[43] Chesterfield County performs no individual studies to determine the impact of a proposed development even though this Court *mandates* such individual determinations if the government conditions land use upon dedications by the landowner.[44]

Moreover, the Fourth Circuit's and the District Court's opinions which held that the Policy did not prevent Chesterfield County from making "individualized determination[s]" miss the point. *Dolan* does not *allow* government to make "individualized determiation[s]", it *requires* them where government requires dedications as a condition of land use.

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[40] App., B3. (emphasis added).

[41] App., B3.

[42] There is, however, no way of knowing if these amounts are "roughly proportional" absent an "individual determination."

[43] App., C1.

[44] *Dolan*, 114 S.Ct. at 2319-20. "[T]he city *must* make some sort of individualized determination that the required dedication is related in nature and extent to the impact of the proposed development." (emphasis added)

The "individualized determination" is a mandate, not merely a good idea. *Dolan* 114 S.Ct. at 2319-20.[45]

c. Cash proffers required and paid are not "roughly proportional"

According to the Policy, "[t]here must be a relationship between the rezoning itself and the need for a public facility."[46] This is not a "roughly proportional" standard or even a "reasonable relationship" standard. Indeed, this is the lowest possible standard and it was rejected by this Court in *Nollan*.[47]

d. Cash proffers are not used for public needs necessitated by an applicant's development

Chesterfield County does not ask a developer to pay cash and to dedicate land in order to offset an impact resulting directly from his development. Rather, the cash and land dedications collected from residential rezoning applicants are put into a fund for countywide improvements. Chesterfield County assumes that the cash and land dedications are needed to fund new public facilities generally.[48] Chesterfield County also assumes that new development is the sole catalyst for any increased demand on public facilities.[49] Cash and land dedications must be used to fund projects in the "Capital Improvement Program."[50] These "improvements" are "schools, roads, parks, libraries and fire stations."[51] If the

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[45] The opinions below also ignore the uncontroverted evidence that Chesterfield County does not —and never has—conducted an "individualized determination" under the Policy.

[46] App., C3.

[47] The only use of the term "reasonable" in the Policy is in the introductory section for the purpose of describing the Policy itself—not the relationship between impacts and required dedications.

[48] App., C1.

[49] *Id.*

[50] App., C3.

[51] *Id.*

"[c]ash proffers [are] not used for the intended purposes within 15 years of receipt will be returned."[52]

e. There are no variance procedures

None. Cash proffers are mandatory.

2. The Policy Violates The Essence Of *Dolan*

In arriving at *Dolan's* "roughly proportional" requirements, this Court relied largely upon the reasoning of the Nebraska Supreme Court in *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W. 2d 293 (1980). *See Dolan*, 114 S.Ct. at 2319. The facts and holding of that case are sufficiently analogous so as to be applicable to this action.

In *Simpson*, the city of North Platte adopted an ordinance ostensibly aimed at lessening traffic congestion on its streets.[53] The ordinance required the dedication of one-half the street adjacent to a building lot to its comprehensive plan width as a condition of obtaining a building permit.[54] The Simpsons applied for a building permit to construct a fast food restaurant on an affected building lot, but refused to dedicate the required property for street improvement.[55]

North Platte argued that the ordinance was a reasonable exercise of its police power for the purpose of promoting the public health, safety and welfare.[56] Similarly, Chesterfield County claims that the cash proffers are necessary for, *inter alia*, schools and fire protection—elements of public health, safety and welfare. North Platte sought dedications to fulfill its comprehensive road plan which was designed to

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[52] App., C5. That Chesterfield County allows itself *15 years* to spend this money is highly illustrative of the lack of an "essential nexus" between a development's impact and a public need. This is merely a government slush fund. And, not suprisingly, Chesterfield County has never returned a dime to a developer.

[53] *Simpson*, 206 Neb. at 241.

[54] *Id.*

[55] *Simpson*, 206 Neb. at 242-43.

[56] *Simpson*, 206 Neb. at 243.

prevent *future* traffic congestion.[57] Likewise, Chesterfield County uses the cash proffers to fund future projects in its "Capital Improvement Program."[58] It is this "banking" of dedications which best illustrates that the required real property dedications in *Simpson*, and the cash and land dedications required by Chesterfield County, are without the "essential nexus" required by *Nollan*, and are not "roughly proportional" as required by *Dolan*. As noted by the *Simpson* Court:

> "[F]or the nexus test to apply, thus making a compulsory dedication constitutionally valid, the nexus must be rational. This means it must be substantial, demonstrably clear and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedications must be for specific and presently contemplated immediate improvements not for the purpose of 'banking' the land use in a projected but unscheduled possible future use."[59]

It is constitutionally impermissible for government to condition land use upon the dedication of property for future public use. The "land banking" found to be constitutionally repugnant in *Simpson* is no different than Chesterfield County's "money banking", taking cash extorted from developers so as to fund contemplated public projects in its "Capital Improvement Program".

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[57] *Simpson*, 206 Neb. at 241, 246.

[58] App., C3.

[59] *Simpson*, 206 Neb. at 245 (quoting *181 Incorporated v. The Salem Cty. Planning Bd.*, 133 N.J. Super. 350, 359 A.2d 501, 506 (1975)) (emphasis omitted).

The lack of a rational and essential nexus between the required cash and land dedications and a development's projected immediate impact is best illustrated by the use of cash proffers for acquiring 2.34 library books per person, 5.53 acres of park land per 1,000 people, and 99 square feet of elementary school space per child.[60] This is Chesterfield County's wish list for which it requires developers to play Santa Claus. Chesterfield County does not—cannot—show that these items are necessitated by any specific residential development. These "needs" are necessitated by people generally—*not* construction.[61] Thus, the result of Chesterfield County's Policy is to shift the burden from the people—traditionally taxed to pay for public services—to a particular, identifiable class—landowners. This Court must not countenance such a result. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *See, Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). *See also Armstrong v. United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

This Court's opinions are of little value if the lower courts do not recognize and fairly apply them. Where, as

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[60] App.,C2. Developers probably should count their blessings that Chesterfield County does not (yet) require them to pay for landfills and jails. App.,C3.

[61] If the mere fact that people who live in homes might be literate and might wish to check out a book from the library can serve as a reason to justify a dedication from a landowner constructing a residential development, then there is probably no human need which residential developers cannot be forced to fund for the benefit of all. The logical result will be to shift the entire tax burden to landowners in order to benefit everyone.

here, a lower court blatantly repudiates this Court's precedent, it is appropriate for this Court to exercise its supervisory power to correct the situation. Indeed, the failure to do so invites the delegitimization of this Court's authority.

THEREFORE, on the questions presented, Petitioners pray that the writ issue.

Respectfully submitted,

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October 25, 1996

FILED
NOV 29 1995
Clerk, U.S. District Court
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, et al.,

Plaintiffs,

v.

CHESTERFIELD COUNTY,

Defendant.

Civil Action No. 3:95cv402

FINAL ORDER

For the reasons stated in the Memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED, ORDERED AND DECREED as follows:

Plaintiffs' motion for summary judgment be and the same is hereby DENIED.

Defendant's motion for summary judgment be and the same is hereby GRANTED, and the Defendant stands dismissed with its taxable costs.

Let the Clerk send copies of the Memorandum and this Order to counsel of record.

/s/ Robert R. Merhige
United States District Judge

NOV 29, 1995
Date

FILED
NOV 29 1995
Clerk, U.S. District Court
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, et al.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 3:95cv402**
CHESTERFIELD COUNTY,	)	
Defendant.	)	

MEMORANDUM

This matter is before the Court on the cross-motions of the parties for summary judgment. Plaintiffs are the National Association of Homebuilders, Homebuilders Association of America, and Homebuilders Association of Richmond. Defendant is Chesterfield County, Virginia ("the County").

Background

In this case the plaintiffs assert that the cash proffer policy ("the Policy") adopted by the County's Board of Supervisors pursuant to *Va. Code* §15.1-491.2 facially violates the Fifth Amendment to the United States Constitution's prohibition on taking of property without just

compensation.[1] The plaintiffs assert that the Policy mandates the payment of cash in exchange for favorable action on residential rezoning applications.

Discussion

Under Federal Rule of Civil Procedure 56(c), the moving party is entitled to summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden is on the moving party, and "the facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to . . . the party opposing the motion." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). The non-moving party, however, may not rest on mere allegations or denials contained in the pleadings, but must come forth with specific facts with affidavits, depositions, interrogatories or other evidence to show a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Allstate Financial Corp. v. Financorp, Inc.*, 934 U.S. 55, 58 (4th Cir. 1989). Summary judgment is proper "if the evidence is such that a reasonable jury could [not] return a verdict for the non-moving party." *Anderson*, 477 U.S. at 251-52.

In this case there are no material factual disputes. The dispositive issue is the purely legal question of whether the Policy is facially invalid under the Takings Clause of the Fifth Amendment to the United States Constitution.

A party mounting an attack under the Takings Clause on the facial constitutionality of a statute or zoning ordinance must show that the "mere enactment" of the statute

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[1] In its Order of July 18, 1995, the Court held that the plaintiffs lacked standing to bring an "as applied" challenge to the Policy.

or ordinance constitutes a taking. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494-495 (1987); *National Advertising Company v. City of Raleigh*, 947 F.2d 1158, 1165, n.9 (4th Cir. 1991); *Beacon Hill Farm Associates II Limited Partnership v. Loudon County Board of Supervisors*, 875 F.2d 1081, 1083-1084 (4th Cir. 1989). As the Supreme Court has noted, the party making such a challenge faces and "uphill battle." *Keystone*, 480 U.S. at 495.

Application of an ordinance effects a taking if "the ordinance does not substantially advance legitimate state interests ... or denies an owner economically viable use of his lane." *Agins*, 447 U.S. at 260. Mere enactment of the Policy did not result in any physical occupation of property by the County, nor did it deprive all economically beneficial use from property; accordingly, enactment of the Policy did not effect the second variety of taking contemplated in *Agins*. *See Garneau v. City of Seattle*, 897 F.Supp. 1318, 1325 (W.D. Wash. 1995), *citing Lucas v. South Carolina*. --- U.S. ---, 112 S.Ct. 2886 (1992). However, the Court concludes it must still determine whether enactment of the Policy was violative of the Takings Clause by not substantially advancing legitimate state interests. For the reasons which follow, the Court believes the policy in issue passes constitutional scrutiny.

The Policy at issue is designed to provide for the capital improvements required by development in the County. It is not disputed that this is a legitimate state interest. However, in order for any specific exaction implemented under a zoning ordinance to pass constitutional muster under the Takings Clause of the Fifth Amendment an "essential nexus" must exist between the exaction and the legitimate state interest. *Nollan v. California Coastal Comm'n*, 483 U.S. 824, 837 (1987). The Supreme Court has used the term "rough proportionality" to describe the nexus which is required. *Dolan v. City of Tigard*, --- U.S. ---, 114 S.Ct. 2309, 2319-2320 (1994). "Rough proportionality" was defined by the Court as

requiring "[n]o precise mathematical calculation" but rather "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.*

The parties have expended great effort to convince the Court that the Supreme Court's decision in *Dolan v. Tigard* is, or is not, applicable in this case. The defendant urges that *Dolan v. Tigard* is applicable only in "as applied" challenges to adjudicative decisions. The plaintiffs assert that decisions on rezoning applications made according to the Policy are incapable of meeting the "rough proportionality" standard laid out in *Dolan v. Tigard* and that the Policy is accordingly facially invalid.

It appears to the Court that *Dolan v. Tigard* is relevant, if at all, because it might set out the test for which any particular application of the County's Policy must meet. If this is so, the question in this matter becomes whether it is possible for County officials to apply the Policy currently at issue in accordance with *Dolan v. Tigard*. However, the Court need not definitively resolve the issue of the applicability of *Dolan v. Tigard* because it determines that the Policy is capable, on its face, of application consistent with the *Dolan v. Tigard* standard. *See United States v. Salerno*, 481 U.S. 739, 745 (1987)("the challenger must establish that no set of circumstances exists under which the Act would be valid"); *Action for Children's Television v. Federal Communications Commission*, 59 F.3d 1249, 1259 (D.C. Cir. 1995)(stating that the challenger must show that the Act is incapable of constitutional application); *see also, Jordan v. Jackson*, 15 F.3d 333, 344 (4th Cir. 1994)("[t]he fact that the relevant statute might operate unconstitutionally under some conceivable circumstances is insufficient to render it wholly invalid").

The County of Chesterfield has adopted an ordinance which authorizes it to accept cash proffers. *Chesterfield County Code* §21.1-8. In order to guide its acceptance of proffers under this authority under §21.1-8, the County Board of

Supervisors adopted the Policy at issue in March of 1990 and subsequently as amended. The Policy states that it "is applicable to all residential rezoning requests." Through a process involving five "components" the Policy calculates "what a new home will cost the County in terms of providing public facilities such as schools, roads, parks, etc." Some of these figures are calculated based on county-wide averages and some are determined based on smaller units. Through these calculations the Policy determines a "maximum cash proffer" amount which a rezoning applicant may tender with his rezoning application. According to the Policy, currently "[r]esidential rezoning applicants are being asked to proffer a maximum of $5,083 per lot [plus an indexed amount for payments after a certain date]." The plaintiffs argue that, in reality, the County requires the maximum proffer in all cases. However, the issue before the Court is whether the Policy is, on its face, capable of application in accordance with the Fifth Amendment. The Policy establishes a maximum proffer amount based on the average cost to the County of a new home. The Policy explicitly provides, however, that this amount is a maximum. According to the language of the Policy there is no requirement that any, or any particular, amount of cash must be proffered for rezoning approval.[2] The Court accordingly concludes that there is no reason apparent on the face of the Policy why the proffers required, if any, can not determined in an "individualized" manner

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[2] While it is not directly relevant, the Court notes that this interpretation of the Policy is supported by affidavits submitted by the plaintiffs which indicate that some rezoning applications are, indeed, granted in the absence of a proffer of the maximum amount. The plaintiffs at oral argument on the instant motion argued that the instances where no proffers were required by the County for favorable action on a rezoning application were instances where the County violated its own Policy and that the language of the Policy, in fact, mandates proffers in all cases. The Court does not agree with this reading of the Policy. The Court finds that the language of the Policy, on its face, establishes a maximum proffer amount but does not require that a proffer be made in every instance.

and fixed at an amount "roughly proportional" in "nature and extent to the impact of the proposed development" according to the test set out in *Dolan v. Tigard*.[3]

Conclusion

The Court concludes that the Cash Proffer Policy of the County of Chesterfield is not facially violative of the Takings Clause of the Fifth Amendment to the United States Constitution. Accordingly, the Court must grant summary judgment to the defendant.

An appropriate Order shall issue.

/s/ Robert R. Merhige

United States District Judge

NOV 29, 1995

Date

[3] The Court notes that it does not reach the question of whether *Dolan v. Tigard* is, in fact, applicable to the particular decisions on rezoning applications rendered pursuant to the Policy. The Court merely finds that it is possible for decisions on rezoning applications rendered in accordance with the Policy also to accord with the test in *Dolan v. Tigard*. Indeed, the Court has not held that it is necessarily unconstitutional for the County to always demand the maximum proffer amount.

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES; HOME BUILDERS ASSOCIATION OF VIRGINIA; HOME BUILDERS ASSOCIATION OF RICHMOND, *Plaintiffs-Appellants,*	)	**No. 95-3213**
v.	)	
Chesterfield County, Virginia, *Defendant-Appellee.*	)	

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., Senior District Judge.
(CA-95-402)

Argued: July 8, 1996

Decided: July 30, 1996

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Glen Franklin Koontz, Washington, D.C., for Appellants. Jeffrey Lee Mincks, Deputy County Attorney, Chesterfield, Virginia, for Appellee. **ON BRIEF:** Thomas O. Bondurant, Jr., BONDURANT & BENSON, P.C., Richmond, Virginia, for Appellants. Steven L. Micas, County Attorney, Lisa C. Dewey, Assistant County Attorney, Chesterfield, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The National Association of Home Builders ("NAHB"),* brought this action against Chesterfield County, Virginia ("the County"), challenging the constitutionality of a policy formulated pursuant to Chesterfield County Ordinance § 21.1-8, which permits the County to accept cash proffers from residential development rezoning applicants ("cash proffer policy"). The County uses the money collected under the cash proffer policy to offset the increased cost of specific capital improvements necessitated by proposed residential developments. If the County does not use the money for new capital improvements within fifteen years, it is returned to the property owner. NAHB contends the cash proffer policy, on its face, violates the Fifth and Fourteenth Amendments because it amounts to a taking of its member homebuilders's property without just compensation.

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* The Home builders Association of Virginia and the Home Builders Association of Richmond also joined NAHB as plaintiffs in this lawsuit.

The County's cash proffer policy is facially invalid under the Takings Clause only if it denies a property owner economically viable use of his land or fails to advance legitimate state interests. *See Agins v. Tiburon*, 447 U.S. 255, 260 (1980). The cash proffer policy does nothing to deny an owner economically viable use of his land, and NAHB does not argue to the contrary. Rather, NAHB contends the cash proffer policy fails to advance legitimate state interests. Although NAHB concedes that the policy's purported goal of funding capital improvements is legitimate, it argues that the cash proffer policy violates the Takings Clause because there is no "essential nexus" between the exaction and the funding of capital improvements. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (holding that essential nexus between exaction and legitimate state interest is required to withstand constitutional scrutiny). In other words, NAHB contends the policy is invalid because, as crafted, it can never be applied in such a way as to ensure "rough proportionality" between the amount of the proffer and the actual increased cost of capital improvements. *See Dolan v. City of Tigard*, U.S. , 114 S.Ct. 2309, 2319-20 (1994) (holding that essential nexus requires rough proportionality between the exaction and the legitimate state interest).

The district court noted that the cash proffer policy utilizes a complex methodology that is designed to calculate the average impact of a new residential development in terms of the County's cost of providing new public facilities such as schools, roads, libraries and parks. The policy places a cap on the maximum cash proffer amount it will accept per lot, but no requirement is written into the policy that a residential rezoning applicant proffer any amount at all to receive approval of his application. The district court held the County's policy survives a facial attack on its constitutionality because there is no reason apparent on the face of the policy why any proffer could not be determined in an

amount roughly proportional to the impact of the proposed development.

On appeal, NAHB contends that rough proportionality requires the County to make more stringent individualized determinations before calculating a cash proffer amount. Such a requirement, however, approaches one of "exact proportionality," which clearly is not required under the Constitution, nor feasible in practice. Accordingly, we reject NAHB's argument.

We have read the briefs, heard oral argument, and given full consideration to the parties' contentions. Finding no error in the district court's opinion, we affirm on its reasoning. *National Ass'n of Home Builders v. Chesterfield County*, 907 F. Supp. 166 (E.D. Va. 1995).

AFFIRMED

CASH PROFFERS

ADOPTED POLICY

A. Underlying Assumptions of Adopted Policy

1. There is no "right" answer for a cash proffer methodology. Any policy must only meet a "reasonableness" test, that there must be some rationale for the approach chosen even though people may disagree about the "best" approach.
2. "Simple" does not equal "illegal".
3. Revenues generated by growth, i.e. residential and commercial real estate taxes, sales taxes, fees, etc. go to pay the normal operating costs of providing services for new residents, but that there is nothing left over to pay for the cost of capital facilities needed to serve these new residents.
4. **Countrywide averages**, where possible, will be used to determine the cost per dwelling unit of a public facility.

B. Adopted Policy Items

1. Methodology

   The staff approach to determining the cost of public facilities related to growth has been to simplify the calculations by making the above assumptions: that any revenue derived from growth will pay all the normal operating costs for services to new residents and relying on the use of Countywide averages where possible.

   There are five "components" involved in calculating what a new home will cost the County in terms of providing public facilities such as schools, roads, parks, etc. The components are as follows:

   a. Calculation of demand generators (such as number of people, or number of students) associated

with a new dwelling unit. Staff uses the weighted average of single family and multi-family persons per household (2.80 for FY95) and an average number of students per household (.58 for FY95)

b. Calculation of existing service level standards for each type of facility for which a cash proffer will be collected. Examples of service level standards are: 5.53 acres of community serving park land per 1,000 people, 2.34 library books per person, and 99 square feet of space per elementary school child. The documentation of actual or existing service level standards is the most time consuming component of calculating facility costs.

c. Calculation of the gross cost of public facilities. The term gross costs is used because a credit for anticipated future revenues from a new home will be applied against the gross cost (d). For example, to calculate the gross cost of park facilities, multiply the average persons per household by the cost per acre of park land plus improvement cost per acre of park land times the acres per capita.

d. Calculation of a credit to apply against the gross cost for each facility. Chesterfield has issued and will continue to issue general obligation bonds to finance the construction of public facilities. New residents will pay real estate taxes to Chesterfield. A portion of these real estate taxes will go to help retire this debt. So that new residents are not "double taxed" (once through payment of a cash proffer and again through real estate taxes) a credit is computed for each facility.

e. Calculation of the net cost per facility or maximum cash proffer. This is the gross cost (c) per

facility minus the applicable credit (d) per facility.

2. Cash proffers must be used to fund projects in the Capital Improvement Program.
3. The following capital improvements will be funded by cash proffers: schools, roads, parks, libraries and fire stations. **The cash proffer program does not presently include capital improvements such as jails and landfills.**
4. Cash proffers will be applicable to all residential rezoning requests.
5. Payment of the cash proffer must occur prior to or at the time of building permit application. Originally, the policy required that payment of the residential cash proffer be bonded at the time of subdivision recordation and that the proffers be paid within two years thereafter, or at the time of building permit application, whichever occurred first. The requirement that proffers be paid within two years of subdivision recordation was included to help ensure that new facilities would be available near the time they would be needed for new residents. Bonding was required to enforce the two year payment provision. On August 29, 1991, the policy was amended to eliminate the bonding provision and the two year payment provision.
6. There must be a relationship between the rezoning itself and the need for a public facility. In order to illustrate this relationship, geographic service areas or districts were established across the County.

   Since parks, libraries, and fire stations serve the entire County, the geographic service districts for these facilities were determined to be Countywide. Rezoning requests can be analyzed on a Countywide basis to determine whether they create a need for additional park, library, and fire station facilities.

With respect to high schools and middle schools, the County is divided into two geographic service districts: north of Route 360 and south of Route 360. With respect to elementary schools, the county is divided into 8 zones corresponding to the current high school attendance zones.

To determine road costs, two geographic service districts, one north of Route 360 and one south of Route 360, were established. These service districts were used in calculating a road cost per dwelling unit. The Transportation Department then identified 19 traffic sheds across the County. Money collected from a development within a particular shed will be spent on improvements within that shed.

7. In some instances, a rezoning applicant may wish to donate property either in lieu of the cash proffer or as a credit against a portion of the cash proffer. Property designated for donation (excluding roads) would need to follow the County's "Procedure for Acquisition of Private Property for Public Use." Credits may be given for usable land or improvements donated to the County with the following provisos: (i) credit for a land or construction contribution will not exceed the calculated cost of the facility required by the rezoning and (ii) credit for roads will be allowed for "off-site" land contributions or improvements.

The value of the donated land will be based on the acquisition cost of the property not to exceed the cost per acre used in the calculation of the proffer. If the value of a donated parcel is significantly more or less than the value used to determine the proffer, then the proffer would be recalculated. In the case of off-site improvements, the value of such improvements would be the estimated cost if constructed by a governmental entity.

8. Cash proffers not used for intended purposes within 15 years of receipt will be returned.
9. Adjustments in the cash proffer amount will be considered every fiscal year in June. Staff will recompute facility costs and credits based on the current methodology and recommend adjustments. Any adjustments would be effective July 1 of the new fiscal year.
10. Residential rezoning applicants are presently being asked to proffer a maximum of $5,083 per lot for payments made prior to June 30, 1995, and a maximum of $5,083 per lot plus the Marshall Swift Building Cost Index for payments made after June 30, 1995.

Supreme Court, U.S.
FILED
NOV 22 1996
CLERK

(2)

No. 96-656

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE HOME BUILDERS ASSOCIATION OF VIRGINIA AND THE HOME BUILDERS ASSOCIATION OF RICHMOND,

Petitioners,

v.

CHESTERFIELD COUNTY, VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONERS

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The Building Industry Legal Defense Foundation has received the written consent of the parties to file this brief in support of petitioners, and has filed the letters of consent with the Clerk of this Court.

INTERESTS OF AMICUS CURIAE

The Building Industry Legal Defense ("BILD") Foundation is a not-for-profit corporation organized under the laws of the State of California. The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of Southern California whose 1400 members include a significant number of residential developers and associate businesses that take part in building 70% of all new homes annually in the Southern California region.[1]

The BILD Foundation's interest lies in countering local governments' funding needs with the need for affordable housing. Some communities in California are now demanding fees up to $77,000 per house.[2] Heightened scrutiny applied to such fees would demonstrate to an apprehensive home buyer that the fee paid directly mitigated the impact from the new home. A 10-20% miscalculation could result in

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[1] The BILD Foundation's mission is to "[d]efend the legal rights of home and property owners." The BILD Foundation promotes and supports important legal cases to secure a body of favorable court decisions for its members specifically, and property owners and developers generally.

[2] For example, fees associated with the issuance of a building permit in the City of Solana Beach for a 2,000 square foot, 3 bedroom, 2 bath home valued at $169,000 can cost $77,721 [the following fee schedule is similar in its adoption and application to Chesterfield's Cash Proffer Policy: plan check—$797; building permit—$1,226; MPE permits—$216; seismic—$17; sewer—$4,500; water—$4,761; public facilities—$1,690; parks—$600; fire—$442; elementary school—$8,432 (this amount can run as high as $38,882 for "affordable housing"); high school—$10,590; inclusionary housing—$14,000] excluding fees for engineering, subdivision processing, annual sewer service charges, and adjudicatively imposed fees.

significant savings. According to the National Association of Home Builders, even a $1,000 increase in the purchase price of a home can force 21,000 potential buyers out of the market. *The Truth About Regulations and the Cost of Housing* (NAHB, 1995) p.6.

SUMMARY OF ARGUMENT

The Fourth Circuit Court of Appeals stated that the reduced scrutiny of the standard articulated in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) should apply in this case rather than the standard articulated in *Dolan v. City of Tigard*, 129 L.Ed. 2d 304 (1994). This determination is based on the principle that the *Agins* standard applies to all land use regulation facial challenges. However, such a principle is in conflict with *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Agins has generally, yet incorrectly, been applied to facial challenges to land use regulation without regard to any other characteristics of the regulation. On the other hand, *Dolan* has been used in as-applied challenges. However, *Lucas* applied *Agins* to an as-applied challenge. Therefore, the distinction between facial and as-applied challenges is a distinction without a difference. This Court's opinion in *Dolan* should have been sufficient to resolve this confusion. In *Dolan*, this Court distinguished *Agins* by stating that *Agins* should apply to "essentially legislative determinations classifying entire areas of the city" not where "the city made an adjudicative decision to *condition petitioner's application for a building permit* on an individual parcel." Emphasis added. *Dolan*, 129 L.Ed 2d 316. The key distinction is when compliance with the regulation is required, e.g., at the time of adoption or, at the time of issuing a building permit. The application of *Agins* is limited solely to circumstances where the challenged regulation does not require the imposition of a condition on the application for a building permit. For this reason alone, certiorari should be granted.

Certiorari should also be granted to clarify the well-established conflict in various state and federal courts regarding whether the standard articulated in *Dolan v. City of Tigard*, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) applies to legislatively enacted monetary exactions.

It is evident that monetary exactions or fees should be held to the same level of scrutiny as those involving dedications. For if monetary exactions receive less scrutiny, public agencies will simply impose a fee and then use the fee to purchase a possessory interest or construct a public improvement for which they would have otherwise been required to pay. The law does not permit public agencies to do indirectly what it does not permit directly.

Additionally, there remains a heightened risk of extortion for legislative acts imposing a fee because no notice is required to be given to the fee payor at the time the fee is legislatively adopted. Furthermore, legislative acts do not enjoy absolute deference. The Constitution applies equally to legislative as well as adjudicative acts.

ARGUMENT

A. CERTIORARI SHOULD BE GRANTED TO CRYSTALLIZE THE APPLICATION OF *AGINS* TO REGULATIONS WHICH REQUIRE COMPLIANCE AT THE TIME OF ADOPTION RATHER THAN THE TIME OF ISSUING A BUILDING PERMIT

There is much confusion among land use practitioners and the courts regarding when the standard elicited in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) is applicable. That standard states that a land use regulation does not affect a taking if it "substantially advances legitimate state interests" and does not "deny an owner economically viable use of his land." *Agins, supra*, 447 U.S. 260.

In essence, some believe that the *Agins* standard applies to facial challenges, whereas *Dolan v. City of Tigard,* 129 L.Ed. 2d 304 (1994) applies to as-applied challenges. However, as we shall see, this Court's decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) is in conflict with such a rule. To understand this problem, let us first look to *Agins.*

There can be no doubt that the *Agins* standard applies to facts which are similar to *Agins.* The plaintiffs in *Agins* brought a challenge to the zoning ordinances which were placed on plaintiffs' property. *Agins,* 447 U.S. 257. These ordinances limited the use of their property to 1 to 5 dwelling units. *Id.* The ordinances were effective immediately upon passage and did not require an application for a building permit to trigger their effect. *Id.* Indeed the plaintiffs "never sought approval of their land under the zoning ordinances." *Id.*

The plaintiffs challenge was classified as a facial challenge to the ordinances. *Agins,* 447 U.S. 259. It is the overemphasis of this characterization which has led to so much confusion. A facial challenge seeks to overturn the legislative act or provision in its entirety, regardless of how it is applied to specific situations, or in this context, to specific parcels of land. A successful facial challenge must show that there are no circumstances upon which the challenged provision can be legitimately applied. *United States v. Salerno,* 481 U.S. 739, 745 (1987); *Reno v. Flores,* 507 U.S. 292, 300 (1991)

By contrast, *Lucas,* which did not involve a facial challenge but rather challenged the application of South Carolina's Beachfront Management Act to Mr. Lucas' property, also applied the *Agins* standard. *Lucas,* 505 U.S. 1003, 1007-8, 1016. Therefore, since *Agins* was applied to an as-applied as well as facial challenge, it would seem that the crucial distinction regarding the applicability of the *Agins* standard is not whether the type of challenge.

This Court in *Dolan v. City of Tigard,* 129 L.Ed. 2d 304 (1994), shed some light on the applicability of the *Agins* standard. This Court distinguished *Agins* by stating that *Agins* "involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to *condition petitioner's application for a building permit* on an individual parcel." Emphasis added. *Dolan,* 129 L.Ed 2d 316.

As discussed below, the formalistic distinction as to whether the agency charged with responsibility for making land use decisions is acting in a legislative or adjudicative capacity is a distinction without a difference.

The only way to reconcile *Lucas* with *Agins* and *Dolan* is to look to *when compliance with the regulation is required.* If the time for compliance is effective immediately upon its adoption, as is the case with zoning ordinances which limit the use of property, then *Agins* applies. However, if compliance is delayed until, and triggered by, an application for a land use or building permit, then *Dolan* should apply. It is in the latter situation that there is a heightened risk of extortion. *See, Nollan v. California Coastal Commission,* 483 U.S. 825, 837.

It cannot be overemphasized that *Agins* does not apply to regulations which require the imposition of a condition upon a building permit application. The regulation challenged in *Dolan* was the conditioning of a building permit. Yet this Court specifically stated that if *Agins* did apply, Ms. Dolan would have lost. The conditions at issue in *Dolan* did not deprive Ms. Dolan of all economically viable use of her property (*Dolan, supra,* 129 L.Ed 2d 316, fn. 6) and the conditions substantially advanced a legitimate governmental interest (*Dolan, supra,* 129 L.Ed 2d 318).

Chesterfield County's Cash Proffer Policy requires that a "[p]ayment of the cash proffer must occur prior to or at the time of building permit application." Cash Proffer Adopted

Policy B.5. Therefore, *Dolan* should apply regardless of whether the Policy is challenged on its face or as-applied.

B. CERTIORARI SHOULD BE GRANTED TO RESOLVE IMPORTANT ISSUES AS TO WHICH THERE IS A WELL-ESTABLISHED CONFLICT IN BOTH STATE AND FEDERAL COURTS

1. State And Federal Courts Are Split As To Whether *Dolan* Applies To Monetary Exactions In Addition To Those Involving Dedications.

There is a well-developed split as to whether *Dolan* extends heightened scrutiny solely to permit conditions that require the dedication of real property and the concomitant loss of the right to exclude, or whether *Dolan* applies to monetary exactions as well.

Courts that have applied, or suggested the appropriateness of applying, a heightened scrutiny to development fees include state cases such as *Ehrlich v. City of Culver City,* 911 P.2d 429 (1996), *cert. denied,* 1996 U.S. LEXIS 6172, *Northern Illinois Home Builders Association, Inc. v. County of Du Page,* 649 N.E.2d 384 (Ill. 1995); *Home Builders Association of Central Arizona v. City of Scottsdale,* 902 P.2d 1347 (Ariz. 1995); *Clark v. City of Albany,* 904 P.2d 185 (Or. 1995); *Trimen Development Company v. King County,* 877 P.2d 187 (Wash. 1994); *College Station v. Turtle Rock,* 680 S.W.2d 802 (Tex. 1984); *Collis v. Bloomington,* 246 N.W.2d 19 (1976); *Jenad, Inc. v. Scarsdale,* 218 N.E.2d 673 (N.Y. 1966), and *Remmenga v. California Coastal Comm'n,* 163 Cal.App.3d 623, 628 (1985). At least one federal case has suggested that *Dolan* is relevant in assessing impact fees. *City of Portsmouth v. Schlesinger,* 57 F.3d 12 (1st Cir. 1995) (relying in part on *Dolan* to strike down an affordable housing impact fee).

On the other side, some state courts have limited *Dolan's* applicability to dedications, or suggested as much. *McCarthy v. City of Leawood,* 894 P.2d 836 (Kan. 1995);

Waters Landing Limited Partnership v. Montgomery County, 650 A.2d 712 (Md. 1994); *Blue Jeans Equities West v. City and County of San Francisco,* 221 Cal.App.3d 1072 (1992). So too have some federal courts. *Clajon Production Corp. v. Petera,* 70 F.3d 1566 (10th Cir. 1995); *Commercial Builders v. City of Sacramento,* 941 F.2d 872 (9th Cir. 1991); *Garneau v. City of Seattle,* 897 F.Supp. 1318 (W.D. Wash. 1995).

2. State And Federal Courts Are Split As To Whether *Dolan* Applies To Legislative Actions.

A number of state courts have seized on Justice Rehnquist's notation[3] that the exaction in *Dolan* was imposed on a building permit—issuance of which is an "adjudicative" act—to find that heightened scrutiny does not apply to exactions imposed on building permits pursuant to ordinances of general application. *See Ehrlich, supra; Loyola Marymount Univ. v. Los Angeles Unified School District,* 45 Cal.App.4th 1256 (1996); *Home Builders Association of Central Arizona v. City of Scottsdale,* 902 P.2d 1347 (Ariz. 1995); *Southeast Cass Water Resource District v. Burlington Northern Railroad Co.,* 527 N.W.2d 884 (N.D. 1995); *Waters Landing Limited Partnership v. Montgomery County,* 650 A.2d 712 (Md. 1995); *Parking Association of Georgia v. City of Atlanta,* 450 S.E.2d 200 (Ga. 1994) *cert. denied, 115 S.Ct. 2268 (1995); Arcadia Development Corp. v. City of Bloomington,* 552 N.W.2d 281 (1996); *San Mateo Coastal Landowners' Association v. County of San Mateo,* 38 Cal.App.4th 523 (1995). So too has at least one federal court. *Harris v. City of Wichita,* 862 F.Supp. 287 (D. Kan.1994).

Other state courts have held that exactions legislatively imposed pursuant to ordinances of general applicability are subject to *Dolan's* heightened scrutiny. *Art Piculell Group v. Clackamas County,* 922 P.2d 1227 (1996); *J.C. Reeves Corp. v. Clackamas County,* 887 P.2d 360 (Or. 1994); *Schultz v. City of Grants Pass,* 884 P.2d 569 (Or. 1994); *Northern Illinois Home*

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[3] *Dolan, supra,* 114 S.Ct. at 2316, fn. 8.

Builders Association, Inc. v. County of Du Page, 649 N.E.2d 384 (Ill. 1995); *Trimen Development Company v. King County,* 877 P.2d 187 (Wash. 1994) [A county ordinance requiring developers seeking to build housing either dedicate land for public parks or pay a fee must meet *Dolan*'s "rough proportionality" test]. Justice Mosk's concurring opinion in *Ehrlich* stated that "even generally applicable laws which authorize the physical occupation of the property are takings. . . ." *Ehrlich, supra,* 911 P.2d at 460, n.4.

Federal courts have also held that *Dolan's* heightened scrutiny applies to legislatively imposed fees. *Manocherian v. Lennox Hill Hospital,* 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied* 115 S.Ct. 1961, 115 S.Ct. 1962 (1995); *Amoco Oil Co. v. Village of Shaumburg,* 661 N.E.2d 380 (1995).

Two members of this Court are on record as supporting granting certiorari to address this issue. In dissenting from the denial of a writ of certiorari the Justices stated:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distraction without a constitutional difference.

Parking Association of Georgia, Inc. v. City of Atlanta, Georgia 115 S. Ct. 2268 (1995)(Thomas, J. and O'Connor, J. dissenting).

C. *DOLAN* APPLIES TO MONETARY EXACTIONS

The Supreme Court's decision in *Dolan* itself strongly suggests that the rough proportionality standard is applicable to monetary exactions. Several of the cases relied upon by this Court in arriving at the rough proportionality standard in *Dolan* involved takings challenges to fees.[4] *E.g., Jordan v. Village of Menomonee Falls,* 137 N.W.2d 442 (Wis. 1965); *Collis v. Bloomington,* 246 N.W.2d 19 (Minn. 1976); *College Station v. Turtle Rock,* 680 S.W. 2d 802, (1984); *Jenad, Inc. v. Scarsdale,* 218 N.E.2d 673 (N.Y. 1966).

In addition, courts, like legislatures, do not engage in idle acts. This Court's decision in *Ehrlich v. Culver City,* 114 S. Ct. 2731 (1994) to vacate and remand the Court of Appeal's original decision was a clear signal that the principles set forth in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), and *Dolan* apply to monetary exactions.[5] As the Arizona Court of Appeals stated in *Home Builders Association of Central Arizona v. City of Scottsdale,* 902 P.2d 1347, 1352 (1995), "we agree that the *Ehrlich* remand implies that a monetary fee is subject both to a takings analysis, and . . . to a *Dolan* analysis."

Common sense supports this position. As an initial matter, it is difficult to conceive of a justification for subjecting impact fees to a lesser degree of scrutiny than dedication

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[4] Justice Stevens recognized this point in his dissent, noting that the cases cited by the majority "involve challenges to provisions . . . requiring developers to dedicate either a percentage of the entire parcel . . . or an equivalent value in cash . . . to help finance the construction of roads, utilities, schools, parks, and playgrounds." *Dolan* at 129 L.Ed.2d 326 (Stevens, J., dissenting).

[5] "Whenever this Court grants certiorari and vacates a court of appeals judgment in order to allow that court to reconsider its decision in the light of an intervening decision of this Court, the Court is acting on the merits." *Board Of Trustees Of Keene State College et al. v. Sweeney* 439 U.S. 24, 25-26 (1978).

requirements. Monetary exactions are the functional equivalent of dedications. Treating fees and dedications differently would create a giant loophole in the *Nollan/Dolan* doctrine. If fees were subject to a lesser degree of scrutiny, government would have the incentive and ability to demand mitigation through fees exclusively. Nothing would prevent government from exacting a fee, exercising its power of eminent domain, and using the fee revenue to pay for the acquisition or improvement. From the property owner's perspective, he or she is left in the same position as would have been the case had the original exaction been a dedication requirement.

Post-*Dolan* cases recognize this proposition and are in accord with it. In *City of Portsmouth v. Schlesinger,* 57 F.3d 12 (1st Cir. 1995), the U.S. Court of Appeals for the First Circuit suggested that Dolan's rough proportionality standard applies to impact fees that were imposed on a development project by the City of Portsmouth, New Hampshire. In *Trimen Development Company v. King County,* 877 P.2d 187, 192 (1994), the Washington Supreme Court applied *Dolan*'s heightened scrutiny to a park impact fee, holding that to be valid, an impact fee must be "required to mitigate the direct impact of the development." And in *Northern Illinois Home Builders Association, Inc. v. County of Du Page,* 649 N.E.2d 384 (1995), the Illinois Supreme Court subjected a transportation impact fee to Dolan's heightened scrutiny.

Pre-*Dolan* California cases have also suggested that dedications and fees should be evaluated similarly for takings purposes. In *Remmenga v. California Coastal Comm'n.,* 163 Cal.App.3d 623, 628 (1985), the Court of Appeal recognized the functional equivalence of fees and dedications:

> Viewing the problem as a whole, it appears that the requirement to pay an in lieu fee of $5,000 for development of one lot presents essentially the same constitutional issue as would be presented by a requirement that the owner of unimproved property adjoining tidelands dedicate public right-of-way in order to obtain a development permit.

See also, Associated Homebuilders of the Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (1971) (applying the same takings analysis to a park land dedication requirement and a park impact fee); *Grupe v. California Coastal Comm'n.,* 166 Cal.App.3d 148, 163 (1985) (discussing the proper standard for testing the validity of "all exactions").

In light of the foregoing discussion, *Blue Jeans Equities West v. City and County of San Francisco,* 221 Cal.App.3d 1072 (1992), and *Commercial Builders v. City of Sacramento,* 941 F.2d 872 (9th Cir. 1991), were overruled by *Dolan. Blue Jeans Equities,* in particular, relied on reasoning that was expressly rejected in *Dolan.* The Court of Appeal in *Blue Jeans* stated that the "High Court appears to make a distinction between regulatory takings, i.e., economic regulation, and possessory takings." *Blue Jeans Equities* at 169. However, while this position was advanced by Justice Stevens in *Dolan* ("The exactions associated with the development . . . are likewise a species of business regulation that heretofore warranted a strong presumption of constitutional validity." *Dolan, supra,* 129 L.Ed.2d at 327), it was dismissed by the majority.

D. *DOLAN* APPLIES TO LEGISLATIVE ACTIONS

1. The Limitations Of The Fifth Amendment Apply To Fees Adopted By A Legislative Action As Well As An Adjudicative Action.

The conditions in *Dolan,* like Chesterfield County's Proffer Policy, were imposed under the authority of an ordinance of general application. The City of Tigard's Comprehensive Development Code required all property owners in the Central Business District to comply with certain dedication requirements for pedestrian/bicycle pathways and

greenway/drainage space. *Dolan, supra,* 129 L. Ed. 2d at 311-313. As Justice Souter recognized:

> The majority characterizes this case as involving an "adjudicative decision' to impose permit conditions . . ., but the permit conditions were imposed pursuant to Tigard's Community Development Plan. *Dolan supra,* 129 L. Ed. 2d at 334 (Souter, J., dissenting).

Thus, the nature of the exaction involved in *Dolan* and in this case are identical on this point: each was a legislative determination applicable to all development projects.

Nollan, supra, 483 U.S. at 829 makes clear that the exaction imposed was made pursuant to a legislative act, the California Coastal Act of 1976:

> The Superior Court . . . finding, in part to avoid issues of constitutionality, "that the California Coastal Act of 1976, Cal. Pub. Res. Code Ann. @ 30000 et seq. (West 1986), authorized the Commission to impose public access conditions on coastal development permits for the replacement of an existing single-family home with a new one only where the proposed development would have an adverse impact on public access to the sea.

Unfortunately, lower courts and public agencies have misread the *Dolan* and the *Nollan* decision by seizing upon the "adjudicative decision" language used by the majority in *Dolan, supra,* 114 S.Ct. at 2316, fn. 8, as limiting the application of *Dolan and Nollan.*

Subsequent to its decision in *Dolan,* this Court has confirmed that Dolan applies to legislative acts. In *Altimus v. Oregon,* 115 S. Ct. 44, (1994), this Court vacated and remanded the case to the Court of Appeals of Oregon "for further consideration in light of *Dolan v. City of Tigard.*" *Altimus* involved a takings challenge to an exaction imposed as a condition to a project requesting a zoning change—a

legislative act. (See footnote 5, *supra.*) Similarly, Chesterfield County's Cash Proffer Policy applies to all residential rezoning requests. Cash Proffer Adopted Policy B.4.

Post-*Dolan* cases have recognized that heightened scrutiny is appropriate where an exaction is being applied to a particular project, notwithstanding whether the government approval being sought is nominally "legislative" or "adjudicative." In *J.C. Reeves Corp. v. Clackamas County,* 887 P.2d 360 (Or. 1994), the Court applied Dolan's rough proportionality standard to exactions imposed pursuant to a county-wide zoning ordinance:

> [T]he county relies on the fact that some of the improvements are required by its zoning ordinance. As we said in *Schultz v. Grants Pass* . . . however, "the character of the [condition]remains the type that is subject to the analysis in *Dolan*' . . ., whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters. Our conclusion is not at odds with the Supreme Court's differentiation between adjudicative conditions and particular properties and generally-applicable legislative regulations. . . . A condition on the development of particular property is not converted into something other than that by reason of legislation that requires it to be imposed. *Id.* at 365, n.1 (citation omitted).

See also, Schultz v. City of Grants Pass, 884 P.2d 569 (Or. 1994) (*Dolan*'s heightened scrutiny standard applicable to city's exaction, notwithstanding the fact that the exaction was imposed pursuant to city-wide ordinance of general application).

At least one Pre-*Dolan* California decision is in accord. *See Scrutton v. County of Sacramento,* 275 Cal.App. 412 (1969) (applying *Dolan*-like scrutiny to exaction imposed on a rezone application).

2. Concern For A Heightened Risk Of Extortion Requires *Dolan's* Application to Legislatively Adopted Fees.

Some courts have distinguished *Dolan's* requirements in treating legislatively adopted fees (see e.g., *Ehrlich, supra,* 911 P.2d 429, 444) based upon this Court's statement in *Nollan,* that a local agency's exaction may amount to "out-and-out . . . extortion." *Nollan, supra,* 483 U.S. at p. 837.

However, if one were to apply this Court's principle regarding extortion, legislative actions should not be treated differently. The heightened risk of extortion, exists no less for legislatively adopted fees. The new home buyer has the least political clout to remedy extortionate fees because he or she usually resides outside of the public agency's jurisdiction at the time of the fee's adoption.

The new home buyer is not required to receive notice of a legislatively adopted fee and therefore is not able to become involved in the "political process."

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard."
>
> *Bi-Metallic Co. v. Colorado* 239 U.S. 441, 445 (1915).
>
> [O]nly those governmental decisions which are adjudicative in nature are subject to procedural due process principles. Legislative action is not burdened by such requirements.

Mullane v. Central Hanover Trust Co. 339 U.S. 306, 313 (1950); *see also, Horn v. County of Ventura,* 596 P.2d 1134, 1137 (1979).

Elected officials and current residents, aware of this fact, often argue in favor of the adoption of fees which pay for public facilities not entirely, or not in the least, caused by new development. Elected officials realize that since the ultimate fee payor is not currently a constituent and has not received notice, he or she is unlikely to express his or her displeasure with the fee by voting the decision maker out of office.[6] In addition, the current residents, looking out for their own interests, generally believe that it is better for new residents, rather than themselves, to pay for such facilities. As a result, the risk of extortion for legislatively imposed fees is just as high, if not higher than it is for those which are individually imposed.[7]

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[6] *See, e.g., California Building Industry Association v. Governing Board of Newhall School District,* 206 Cal.App.3d 212, 218 (1988) ("... the exactions were imposed not on an electorate which, unsurprisingly, voted overwhelmingly to approve them, but rather solely on the developers of new residential projects."); *Stubblefield Construction Co. v. City of San Bernardino,* 32 Cal.App.4th 687, 711 (1995) *cert. denied* 116 S.Ct. 300 ("It is not uncommon or unusual for a legislator to oppose a project and to use all means within his or her power to defeat it. After all, a legislator is supposed to respond to the concerns of his or her *constituents*.... Whether their concerns were proper or justified is not the issue here. The point is that their elected representative decided to oppose the project, and did so vigorously." Emphasis added.).

[7] Justice Scalia hinted at this problem:

> The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise, but rather that it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes.

Pennell v. City of San Jose, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part).

A legislatively adopted fee may be adopted years prior to its actual imposition and on an entire city or county. Fees imposed on adjudicatory land use approvals occur closer in time to the purchase of a new home and on a geographically specific area and are therefore more likely to provide notice to the new home buyer. It seems ironic that the new home buyer should be provided greater protection from extortionate fees where he or she is more likely to receive notice than otherwise.

3. Deference To Legislative Acts Does Not Require Ignoring The Takings Clause

In part, the application of the lower scrutiny of the *Agins* standard by the Fourth Circuit may be based on the greater deference paid to a public agency's legislative, as opposed to adjudicative, actions based on the separation of powers doctrine. Yet, nowhere does this greater deference require judicial review of such a fee to ignore the Constitution.

In a recent decision, *U.S. v. Winstar Corp*, 116 U.S. 2432, 1996 U.S. LEXIS 4266 (1996) (hereinafter "*Winstar*"), this Court stated that complete deference to a legislative assessment is not appropriate when the state's self-interest is at stake. 1996 U.S. LEXIS 4266, *100, fn. 41. The Court further noted that a stricter level of scrutiny applies in such cases. *Id.* The Court characterized self-interest as an:

> [I]nstance in which the government seeks to shift the costs of meeting its legitimate public responsibilities to private parties. [Citation omitted.] The government may not "force some people alone to bear public burdens which . . . should be borne by the public as a whole."[8] *Id.*

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[8] The Court also cited *Dolan* for this proposition noting that all regulations have their costs. *Winstar, supra*, at *76-77 As this Court noted, *supra*, the exactions in *Dolan* were based on legislative enactments.

The Court's clarification was in response to the government's claim that the Sovereign Acts Doctrine applied and therefore absolute deference must be accorded to the Legislature's public and generally applicable act.[9]

Although *Winstar* applied the prohibitions of a different provision of the U.S. Constitution, i.e., the Contract Clause, this Court found that the deference generally granted to legislative determinations is not applicable where the interpretation or application of a Constitutional provision is at issue. As this Court has stated, "whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Nixon v. United States,* 506 U.S. 224, 238 (1993).

In applying minimum scrutiny to fees imposed on a broad class of people, the Fourth Circuit essentially said that "the frequent and widespread nature of unconstitutional acts will transform them into constitutional acts." This bizarre conclusion was commented upon by Justices Thomas and O'Connor, *supra, in Parking Association of Georgia, Inc. v. City of Atlanta, Georgia* 115 S. Ct. 2268 (1995).

This Court in *Lucas v. South Carolina Coastal Commission,* 505 U.S. 1003 (1992), confirmed that the formalistic

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[9] The government in *Winstar* argued that a standard almost identical to the Agins test should be applied to the public and general act of the legislature, i.e., whether the act "advance[s] the general welfare." *Winstar Corp., supra,* at *93-94. The Fourth Circuit suggested that the test for legislative actions such as Chesterfield County's should be whether they substantially advance a legitimate governmental purpose (the *Agins* test). As this Court rejected the test proffered by the government in *Winstar,* so should it reverse the Fourth Circuit's deferential standard applied to legislatively enacted fees.

distinction between a regulation adopted by a legislative action or an adjudicative action is irrelevant:

> Justice Stevens would "look to the generality of a regulation of property" to determine whether compensation is owing. [Cit. om.] The Beachfront Management Act is general, in his view, because it "regulates the use of the coastline of the entire state."... But a regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquired immunity by prohibiting all religions. Justice Stevens approach renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.
>
> *Lucas v. South Carolina Coastal Commission,* 505 U.S. 1003, 1027, fn. 14.

E. THIS COURT SHOULD GRANT *CERTIORARI* TO PROVIDE THE SAME PROTECTION TO PROPERTY AS IS GIVEN TO FREE SPEECH AND PRIVACY.

In *Dolan v. City of* Tigard, 129 L.Ed 2d 304, 321 (1994), this court stated that "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, Should be relegated to the status of a poor relation in these comparable circumstances." Yet thus far, courts, including the Fourth Circuit, have been reluctant to apply such a standard to the regulation of property. This Court's statement was not dependent upon whether the regulation was challenged on its face or as-applied, whether it was legislatively or adjudicatively imposed, or whether it required a monetary or possessory interest.

The cases which this Court relied upon in *Dolan* held that 1) the government action, i.e., warrantless searches, are generally unreasonable (*Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311-313 (1978)) and 2) the regulation must directly advance the governmental interest asserted and it must not be more burdensome than is necessary to serve that interest (*Central Hudson Gas & Electric Corp. v. Public Service Commission Of New York*, 447 U.S. 557, 561-566 (1980)).

Applying such a rule to the case at bar would require the rebuttable presumption that Chesterfield County's Cash Proffer Policy is unreasonable. Furthermore, the Policy must directly advance the governmental interest of providing public facilities that are required as a result of new development. It is doubtful whether this requirement can be satisfied because Chesterfield County may use the money as a slush fund for 15 years. If not used for its intended purposes by that time it is returned without interest. It is in essence an interest free loan to Chesterfield County. Finally, it is clearly more burdensome on the property owner than is necessary. Such is the case because it fails to consider the use of other funds to pay for such facilities and it assumes that existing residential development as well as new commercial development does not contribute to increased demand for public facilities. Such conditions fail to meet *Dolan's* rough proportionality standard, much less, the standard articulated in *Central Hudson*.

CONCLUSION

Therefore, for the reasons stated above and in the Brief for Petitioners, the BILD Foundation prays that this Court grant certiorari to resolve these important questions of law currently conflicting the lower courts.

Respectfully submitted,

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November 22, 1996

(3)

Supreme Court, U.S.
FILED
NOV 25 1996
CLERK

No. 96-656

In The

Supreme Court of the United States

October Term, 1996

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE HOME BUILDERS ASSOCIATION OF VIRGINIA AND THE HOME BUILDERS ASSOCIATION OF RICHMOND,

Petitioners,

v.

CHESTERFIELD COUNTY, VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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38 pp

QUESTION PRESENTED

Whether this Court should review the decisions of the district court and the court of appeals that a local zoning policy, authorized by a state statute unique to the Commonwealth of Virginia, is facially valid under the Fifth and Fourteenth Amendments to the United States Constitution.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Chesterfield County, Virginia ("County"), by counsel, respectfully requests the Court to deny the petition of the National Association of Home Builders of the United States, the Home Builders Association of Virginia and the Home Builders Association of Richmond (collectively "NAHB") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on July 30, 1996.

STATEMENT OF THE CASE

A. Procedural Posture of the Case

On May 22, 1995, NAHB filed a complaint against the County claiming that the manner in which the County applies its Cash Proffer Policy ("Policy") to residential zoning cases violates the United States Constitution and the laws of the Commonwealth of Virginia. (Appendix ("App.") 1a)[1] The County filed a motion to dismiss because NAHB lacks standing to pursue an "as applied" constitutional challenge on behalf of its members. (App.

[1] Certain localities in Virginia, including the County, are authorized by state law to accept cash payments from a residential rezoning applicant to pay for public facilities necessitated by the applicant's proposed development. The payment proffered by the applicant is called a "cash proffer." The County's Cash Proffer Policy calculates the extent to which a new residential development will create a need for roads, schools, libraries and fire stations. The Policy then establishes a maximum amount per dwelling unit which the County will accept from a rezoning applicant to fund these capital needs.

1a-2a, 4a) The district court granted the County's motion holding that NAHB did not have standing to pursue its "as applied" challenge to the Policy and that NAHB had not alleged a facial constitutional claim.[2] The court also dismissed NAHB's state law claims. (App. 4a-5a)

NAHB then filed an amended complaint in which NAHB abandoned its "as applied" challenge to the Policy and raised a new facial constitutional challenge under the Fifth and Fourteenth Amendments to the United States Constitution. (App. 5a-6a) The district court permitted the Amended Complaint to be filed based in large part on NAHB's new allegation that "the 'mere existence' of Chesterfield County's Policy with respect to cash proffers have [sic] injured all of Plaintiff members." (App. 6a)

In October, 1995, the County filed a motion for summary judgment which was granted by the district court. (Petitioners' Appendix ("Pet. App.") A1) In its memorandum opinion (Pet. App. A2-A7), the court held 1) that the Policy on its face does not effect a taking of the property of NAHB or its members and 2) that no provision of the Policy prevents the County from accepting a constitutionally appropriate cash proffer from a residential rezoning applicant in accordance with this Court's decision in

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[2] The court held that the interests of the members of NAHB are so diverse as to create potential conflicts of interest among the membership. (App. 5a) Despite the name of the organization, NAHB's members include industrial and commercial builders, remodelers, suppliers, developers, real estate agents, architects, attorneys, engineers, bankers and utility companies. (App. 2a) NAHB's membership list comprises 3,619 pages of computer printouts.

Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994). As the court concluded:

> . . . [T]here is no reason apparent on the face of the Policy why the proffers required, if any, can not [be] determined in an "individualized" manner and fixed at an amount "roughly proportional" in "nature and extent to the impact of the proposed development" according to the test set out in *Dolan v. Tigard*.

(Pet. App. A6-A7)[3] Contrary to NAHB's assertions that the County "exacts" cash proffers from rezoning applicants, the district court also found that neither the Policy, nor the County's application of the Policy, mandates the payment of cash proffers by such applicants. (Pet. App. A6, n.2)

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[3] Both the district court and the court of appeals concluded, consistent with the holding in *Dolan*, that the County could make individualized cash proffer decisions that were roughly proportional to the impact of a particular development. (Pet. App. A6-A7; B3-B4) Nonetheless, NAHB asserts repeatedly in its petition that these courts "repudiated" *Dolan*. For example: 1) " . . . [T]his Court needs to . . . correct the Fourth Circuit's radical departure from, and blatant repudiation of, this Court's precedent. . . . " (Petition ("Pet.") 6); 2) "Indeed, the Fourth Circuit's opinion repudiates this Court's mandate. . . . " (Pet. 7); 3) "The Fourth Circuit's refusal to properly apply *Dolan* to the Chesterfield County Policy is inexplicable." (Pet. 7); 4) "The District Court's refusal to apply *Dolan* is equally baffling." (Pet. 7 n.17); 5) "The sum of the Fourth Circuit's defiance and misapplication of *Dolan* is that the Fourth Circuit incorrectly found that the Policy was constitutionally sound." (Pet. 8); 6) "This Court should grant certiorari in order to correct this impudence." (Pet. 7).

On July 30, 1996, the United States Court of Appeals for the Fourth Circuit, in a per curiam opinion, affirmed the decision of the district court stating that, under the terms of the Policy, the County could comply with the requirements of *Dolan* and make legitimate individualized cash proffer determinations in amounts which were roughly proportional to the impact of a proposed development. (Pet. App. B1-B4) The court of appeals also rejected NAHB's contention that *Dolan* requires the County to establish "exact proportionality" between the impact of a proposed development and the amount of cash proffered by a rezoning applicant in order to comply with the Constitution. (Pet. App. B4) At oral argument before the court of appeals, counsel for NAHB contended that the County "would have to show exactly" how a development creates additional demand for public facilities in order to satisfy *Dolan*. In fact, counsel asserted that to satisfy *Dolan*, the County could, for example, be required to canvass each residence, determine how many school-aged children lived in the residence and find out whether the children went to public or private schools. The court of appeals properly concluded that NAHB's notion of "exact proportionality", which was specifically rejected by this Court in *Dolan* in favor of the "rough proportionality" test, was "not required under the Constitution, nor feasible in practice." (Pet. App. B4)

B. Statement of Facts

In 1989, the Virginia General Assembly enacted legislation permitting certain "high growth" localities, including Chesterfield County, to accept cash proffer dedications from residential rezoning applicants in order

to partially offset the cost of public facilities generated by the applicant's proposed development. *Va. Code* § 15.1-491.2:1. The County adopted an ordinance in 1989 allowing the County to accept cash proffers. No other state has a program equivalent to Virginia's cash proffer program.

Before 1989, the residential development industry in Chesterfield County had not contributed significantly to the cost of new public facilities necessitated by development. (App. 14a, ¶ 4) Nor had the County adopted any methodology to determine a maximum contribution which rezoning applicants could appropriately proffer to offset this cost. (App. 14a, ¶ 4) A cash proffer committee ("Committee") was formed to develop a proposed methodology for cash proffers. The 10-member Committee included the attorney for the petitioner, Home Builders Association of Virginia, two representatives of the petitioner, Home Builders Association of Richmond ("HBAR") and several local developers and home builders. (App. 14a, ¶ 5) In addition, HBAR hired a Bethesda, Maryland consultant named Paul Tischler, who had performed development-related fiscal impact analyses for other localities across the country. (App. 14a, ¶ 5)

After extensive discussion among members of the Counties governing body, Board of Supervisors ("Board"), County staff and Committee members, a cash proffer methodology was created which encompassed Tischler's proposed methodology with some modifications. This methodology ultimately became the Policy which is the subject of this case. (App. 15a, ¶ 8) On February 14, 1990, the Board held a public hearing to consider the proposed

Policy and on March 14, 1990 the Board adopted the Policy. (App. 15a, ¶ 10)

The Policy establishes a maximum cash proffer amount which the Board can accept from a rezoning applicant. (Pet. App. C2-C3, ¶ B1e; Pet. App. C5, ¶ B10; App. 15a-16a, ¶ 11) The cash proffer must be used to fund projects in the County's current Capital Improvement Program in accordance with the requirements of *Va. Code* § 15.1-491.2:1. (Pet. App. C3, ¶¶ B2-B3) County-wide districts are used to calculate the impact of each residential unit on libraries, parks and fire stations because each one of these facilities is available to citizens regardless of where they live. (Pet. App. C3, ¶ B6) For example, new residential growth creates the need for 5.53 acres of parks for every 1000 people, 2.34 new library books per person, and 99 square feet of new school space per student (Pet. App. C2, ¶ B1b.) Even though residential development also generates the need for other public facilities, such as solid waste disposal, mental health and correctional facilities, the Policy exempts home builders from contributing to the capital costs of these facilities. (Pet. App. C3, ¶ B3)

In order to calculate the per-dwelling cost of new roads necessitated by residential growth, the County is divided into two service districts. The County is also divided into 19 traffic sheds. If a residential development generates the need for road improvements, road-related cash proffers from a development within a particular traffic shed are used solely for road improvements within that shed. (Pet. App. C4, ¶ B6) The Policy also divides the County into two geographic service districts for the purpose of applying school cash proffers based on the impact of new residential development on middle and high

schools. The County is divided into eight zones for elementary schools. If a residential development generates the need for school cash proffers, the proffers can only be expended in the appropriate district or zone in which the development is located. (Pet. App. C4, ¶ B6; App. 16a, ¶ 13)

The Policy applies to all residential rezoning requests and permits the Board to grant rezoning requests with a proffer that is below the maximum amount or with no cash proffer at all. (Pet. App. C3, ¶ B4; App. 16a, ¶ 12) In all rezoning cases, the County must determine that there is "a relationship between the rezoning itself and the need for a public facility" before it can accept a proffer. (Pet. App. C3, ¶ B6) Consistent with the requirement that cash proffers "can only apply to needs created by the new zoning" and "must be reasonably related to a capital need created by the rezoning" (App. 15a, ¶ 10; App. 12a), the Board regularly approves residential rezoning cases in which the rezoning applicant has proffered less than the maximum cash proffer, or has made no cash proffer, because of the individual circumstances of each rezoning case. (App. 16a, ¶ 14; App. 10a-11a)[4]

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[4] Throughout its petition, NAHB contends that the County "exacts" cash proffers from developers. *See, e.g.*: 1) "The Policy requires Petitioner's members to pay cash and to dedicate real property to Chesterfield County as a condition for the right to construct residential housing" (Pet. iii); 2) "The Policy functions to exact monies and real property from residential rezoning applicants" (Pet. 2); 3) "[T]he Policy denies residential zoning to agricultural land unless the rezoning applicant agrees to pay

REASONS FOR DENYING THE WRIT

A. The Lower Courts Properly Followed the Precedent of This Court to Dismiss NAHB's Facial Challenge

In its amended complaint, NAHB abandoned its original "as applied" constitutional challenge to the Policy and instead contended 1) that the "mere existence" of the Policy injured all of NAHB's members and 2) that the Policy on its face constitutes an uncompensated taking of private property in violation of the Fifth Amendment. As this Court has held repeatedly, a purely facial challenge to a general governmental regulation is "the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The party making such a challenge faces an "uphill battle." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

The district court analyzed NAHB's facial claim in two parts. First, since NAHB claimed that the mere enactment of the Policy constituted an unconstitutional taking,

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cash. . . . " (Pet. 11); 4) "[T]he primary exaction required under the Policy is money." (Pet. 14 n.37); 5) "Cash proffers are mandatory." (Pet. 17). Despite these conclusory assertions, the uncontradicted facts accepted by the district court establish that the County has approved numerous residential rezoning requests even though the applicants made no cash proffers or made proffers which were below the maximum proffer amount provided for in the Policy. (App. 10a-11a; App. 16a, ¶ 14) NAHB's own affidavits confirm that the County approves zoning cases even though the developer proffers less than the maximum amount under the Policy (Pet. App. A6 n.2). In light of these facts and the unambiguous language of the Policy, the lower courts properly rejected NAHB's "mandatory cash proffer" contention. (Pet. App. A6, B3)

the court properly examined the claim using the test in *Agins v. Tiburon,* 447 U.S. 255 (1980) which requires a showing that the Policy "denies the owner economically viable use of his land." *Id.,* 447 U.S. at 260. The court concluded that the Policy did not result in any physical invasion by the County of private property nor did it deprive anyone of the economically viable use of their property. NAHB does not dispute these conclusions in its petition nor did it challenge them before the court of appeals.

Second, the district court analyzed the Policy to determine whether it was "capable on its face of application consistent with the *Dolan v. Tigard* standard." (Pet. App. A5) This analysis was appropriate under *United States v. Salerno* to determine whether there were any set of circumstances under which the Policy would be valid. *Id.,* 481 U.S. at 745. The district court properly held that the Policy would not prevent the County from following the requirements of *Dolan* because:

1) the Policy does not require any developer to proffer cash,

2) the Policy only sets a maximum proffer amount for a proposed development,

3) the Policy utilizes a complex methodology to calculate the maximum proffer amount for each proposed development and

4) the County approves residential rezoning applications with less than the maximum cash proffer or with

no proffer at all based on the individual circumstances of each rezoning case.[5]

As the court stated, "there is no reason on the face of the Policy" why the County cannot determine cash proffers in an individualized manner and fix them at an amount which is roughly proportional to the impact of a proposed development. (Pet. App. A6-A7)

NAHB repeatedly represents in its Petition that neither the district court nor the court of appeals considered or applied *Dolan* in reaching their decisions. NAHB actually claims that both lower courts "repudiated" *Dolan* and relied solely on *Agins* to reach their decisions. This assertion is contradicted by the written opinions of both courts which utilize *Dolan*'s "individualized determination" and "rough proportionality" tests and which cite *Dolan* by name.[6]

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[5] The description "complex methodology" was used by the court of appeals in its per curiam opinion. (Pet. App. B3) The complexity of the methodology ensures that the calculated maximum cash proffer is directly related to an individual development and is reasonably proportional to the impact of the development. The complexity of the methodology also belies NAHB's repeated and unsupported contentions that the County does not make individualized cash proffer determinations that are roughly proportional to a development's impact.

[6] NAHB goes so far as to charge that, during the oral argument before the court of appeals, both Judges Russell and Widener "expressed their disdain for this Court's *Dolan* decision by flatly stating that the 'individualized determination' requirement was 'stupid.' " (Pet. 8 n.19) No such statement was made by any member of the court of appeals. In any regard, it is the written opinion issued by a court, not the socratic dialogue which occurs during argument, which defines the parameters of the court's decision.

Furthermore, the language of the Policy itself contradicts NAHB's assertion that the Policy is facially unconstitutional. The Policy does not require a developer to proffer cash. It does not set an amount to be proffered but instead establishes a maximum proffer amount based on a complex methodology that accounts for the individualized need for public facilities generated by a proposed development. (Pet. App. C1-C5) The Policy expressly embraces the concept of a "reasonable relationship" between cash proffers and development impact. (Pet. App. C1, C3) In addition, the cash proffers which are proffered by a rezoning applicant for a particular development must be spent only on public projects which are currently identified in the County's Capital Improvement Program and which are necessitated by the impact of that development. (Pet. App. C3; App. 15a-16a, ¶¶ 11-13) Furthermore, the facts of this case establish that, in applying the Policy, the County accepts cash proffers based on an individualized assessment of the impact of each development. For example, in five separate rezoning cases the Board has accepted cash proffers that omitted funding for schools since the proposed projects contained retirement communities which were unlikely to generate school children. (App. 10a-11a) Contrary to NAHB's contentions, there is no reason why the County must violate *Dolan* in order to apply its Policy to individual rezoning cases.[7]

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[7] NAHB also contends that the County is improperly "banking" cash proffers contrary to the decision in *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980). The Supreme Court of Nebraska properly invalidated the city's "land banking" because there was absolutely no nexus between the governmental exaction and any need created by the

B. Courts are Properly Applying *Dolan* to Judge the Constitutionality of Individual Land Use Decisions

As this Court explained in *Dolan*, the decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan* apply to land use cases affecting individual properties in which the government requires an exaction of property as a condition for land use approval. *Dolan*, 114 S. Ct. at 2316-17; 2320 n.8. In these circumstances, the burden is placed on the government to justify the exaction by proving that it is reasonably related to the impact of the land use approval being granted. *Id.*, 114 S. Ct. at 2319-20.

Since *Dolan*, the lower courts have consistently applied *Dolan* to judge the constitutionality of land use exactions. For example, *see Goss v. City of Little Rock*, 90 F.3d 306 (8th Cir. 1996) (*Dolan* test used to remand case involving exaction of road right-of-way); *Erlich v. City of Culver City*, 12 Cal. 4th 854, 911 P.2d 429 (1996), *cert. denied*, 136 L.Ed.2d 218 (1996) (City demanded monetary exaction in exchange for construction permit; case remanded for lower court to consider in light of *Dolan*)[8];

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development, as mandated by *Dolan*. *Id.*, 292 N.W.2d at 301. In this case, the County accepts and spends cash proffer funds only for currently identified public projects the need for which is specifically generated by that residential development. (Pet. App. C1-C4)

[8] NAHB inexplicably represents in its Petition that the court in *Erlich* "declined" to apply *Dolan* to the monetary exaction at issue. (Pet. 13 n.35). The Supreme Court of California specifically applied *Dolan* to remand the case and then directed the lower court to apply the *Dolan* test when it reconsidered the case. *Id.*, 911 P.2d at 432-34.

Schultz v. City of Grants Pass, 131 Ore. App. 220, 884 P.2d 569 (1994) (*Dolan* used to judge the constitutionality of conditions imposed by locality in individual zoning case); *Trimen Dev. Co. v. King County*, 124 Wash. 2d 261, 877 P.2d 187 (1994) (same); *J.C. Reeves Corp. v. Clackamas County*, 131 Ore. App. 615, 887 P.2d 360 (1994) (court applied *Dolan* to analyze the constitutionality of exactions required as a condition of subdivision approval.)

NAHB cites *Harris v. City of Wichita*, 862 F. Supp. 287 (D. Kan. 1994), *aff'd without op.*, 74 F.3d 1249 (10th Cir. 1996), *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994), *cert. denied*, 115 S. Ct. 2268 (1995), and *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 183 Ariz. 243, 902 P.2d 1347 (1995) in an attempt to create a "conflict" in lower court decisions. In each of these cases, however, the issue was not a governmental exaction in exchange for a land use approval or benefit. Instead, these cases involved attacks on general land use regulations: *Harris* (amendment of use restrictions in Airport Overlay Districts); *Parking Association* (enactment of an ordinance requiring landscaped areas in parking lots); *City of Scottsdale* (facial challenge to an ordinance establishing a general development fee to cover the cost of utility extensions).[9] Each one of these

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[9] Even though the Arizona court found *Dolan* to be inapplicable to the general fee regulation at issue, it found that the fee was "directly necessitated by the needs created by the new development" and "was to be used to benefit the property on which the fee was imposed." *Id.*, 902 P.2d at 1350. These findings would be sufficient under *Dolan* to establish an essential nexus between the fees and the impact of the development.

courts properly analyzed *Dolan* and concluded that it did not apply to judge the constitutionality of the general land use regulation at issue. These decisions are not at variance with this Court's decision in *Dolan* which specifically distinguished general regulations from specific exactions. *Id.*, 114 S. Ct. at 2316-17. Nor do they create the type of "real and embarrassing conflict of opinion and authority" that warrants a grant of certiorari. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).[10] Instead, the lower courts are uniformly demonstrating that they understand *Dolan* and are not at all reluctant to apply *Dolan* when analyzing the constitutionality of individual land use decisions.

C. This Case Presents a Unique Factual Setting Which is Unsuitable to Review the Principles of *Dolan*.

In *Dolan*, the planning commission for the City of Tigard, Oregon required Mrs. Dolan to dedicate land for a public greenway and a pedestrian/bike pathway before

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[10] NAHB also tries to manufacture a conflict among the courts by claiming that some courts do not apply *Dolan* to exactions of money in exchange for land use approval. To make this claim, NAHB asserts that the courts in *McCarthy v. City of Leawood*, 257 Kan. 566, 894 P.2d 836 (1995) and *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995) held that *Dolan* did not apply to monetary exactions (Pet. 14 n.36). The court in *McCarthy* dismissed the plaintiffs' *Dolan* claim because the plaintiffs cited no authority to support their claim and because the plaintiffs had never presented the claim to the trial court. *Id.*, 894 P.2d at 845. In *Clajon*, the court examined the constitutionality of hunting regulations promulgated by the State of Wyoming; the case had nothing to do with monetary exactions.

the commission would approve an application to expand her plumbing and electric supply store. *Id.*, 114 S. Ct. at 2313-14. Dolan brought an "as applied" challenge to the dedication requirement and this Court held that the city's requirements could constitute an uncompensated taking of Dolan's property.

The mandatory dedication of property as a condition of development approval and the assessment of impact fees at the time of development are common methods used by localities throughout the United States to finance the capital needs created by new development. This Court has considered a number of such cases as have the lower courts. In contrast, the present case involves a land use program, cash proffers, that is unique to Virginia. No other state has such a program and, even in Virginia, not every locality is authorized by the General Assembly to accept cash proffers. Virginia's cash proffer program is limited by statute to "high growth" localities, certain jurisdictions adjacent to these localities and selected Northern Virginia localities. Any further consideration by this Court of the Policy in light of the *Dolan* decision would have limited value when applied by lower courts to the usual "as applied" exaction cases which *Dolan* addresses.

In addition, since this case is limited to a facial challenge to the Policy, the only issue relating to *Dolan* is whether the Policy can be applied consistent with *Dolan*'s requirements. This case does not contain any factual circumstances or details which can be analyzed under the "individualized determination" or "rough proportionality" tests established by this Court. Accordingly, further review of this case will not provide the lower

courts with any greater guidance on how to apply *Dolan* to the individual, fact-specific disputes which come before them.

CONCLUSION

For each of the foregoing reasons, the County, by counsel, respectfully requests that NAHB's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, et al., Plaintiffs,	)	Civil Action No. 3:95CV402
v.	)	
CHESTERFIELD COUNTY, Defendant.	)	

MEMORANDUM

(Filed Sept. 1, 1995)

This matter comes before the Court on Plaintiffs' "Motion to Amend Judgment and For Leave to File Amended Complaint." Plaintiffs are the National Association of Home Builders of the United States ("NAHB"), Home Builders Association of Virginia ("HBAV"), and Home Builders Association of Richmond ("HBAR"). Defendant is Chesterfield County, Virginia. Plaintiffs filed their complaint on May 22, 1995, seeking declaratory and injunctive relief for violations of the Fifth and Fourteenth Amendments to the United States Constitution pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 65 of the Federal Rules of Civil Procedure and for violations of Virginia Code § 15.1-491.2:1 and other state law.

On June 12, 1995, Defendant moved to dismiss Plaintiffs' action for lack of subject matter jurisdiction and failure to state a claim pursuant to Rules 12(b)(1) and

12(b)(6) of the Federal Rules of Civil Procedure. The Court granted Defendants' motion and dismissed Plaintiffs' complaint on July 18, 1995, holding that Plaintiffs lacked standing to bring the action.

Plaintiffs now move the Court pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to amend its Order dismissing the action and to allow them to file and amended complaint. Defendant opposes this motion.

Background

This action arose out of a policy allegedly used by Chesterfield County in deciding residential zoning cases. NAHB is a trade association for the home building and construction industry and its members include not only builders that construct and supply single family homes, but also apartment, condominium, commercial and industrial builders, developers, remodelers, suppliers, subcontractors, real estate agents, architects, attorneys, engineers, banks, and utility companies. HBAV and HBAR are NAHB affiliated associations.

Some of the members of these associations are engaged in the construction, financing, sale and service of homes in Chesterfield County, including the development of residential subdivisions. Before these members can begin development, they must secure the necessary rezoning approval from Defendant Chesterfield County ("the County"). Plaintiffs allege that the County maintains an official and formally adopted policy of demanding cash proffers from rezoning applicants in return for

approval of the applications.[1] According to Plaintiffs, the County will not grant the requested rezoning unless the cash proffer is made. Plaintiffs also claim that the County regularly requires the applicants to dedicate other valuable consideration as a condition of rezoning approval. It is Plaintiffs' position that these involuntary cash proffers violate state law and bear no relationship to the cost to the County of rezoning the requested area. Thus, Plaintiffs contend that such proffers violate the Fifth and Fourteenth Amendment rights of their members seeking to develop in the County.

Discussion

In the instant motion, Plaintiffs claim that their proposed amended complaint cures the defects in standing noted by the Court in the July 18, 1995 Memorandum accompanying its Order dismissing this action. They assert that pursuant to Rule 59(e), the Court should amend its Order to allow them to file their amended complaint.

Defendant responds that the sole purpose of Rule 59(e) is to correct manifest errors of law or fact or to present newly discovered evidence and should only be considered when a court (1) has patently misunderstood a party's case, (2) has made a decision outside of the adversarial issues presented by the parties, or (3) has made a manifest error of reasoning but of apprehension. *See Hutchinson v. Staton*, 994 F.2d 1076 (4th Cir. 1993).

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[1] Plaintiffs claim that the County calls these proffers "voluntary" when they are, in fact, mandatory.

According to Defendant, Plaintiffs have not advanced any reason for the Court to grant Rule 59(e) relief. Defendant also contends that Plaintiffs' proposed amended complaint does not cure the defects in Plaintiffs' standing which led to the dismissal of their lawsuit.

The Court dismissed Plaintiffs' complaint because it concluded that the complaint did not contain allegations sufficient to support the conclusion that the Plaintiffs could assert associational standing to sue on behalf of their members. The Order dismissing the action did not specify whether this action was dismissed with or without prejudice; however, the Court did not intend to dismiss this action with prejudice. Plaintiffs may amend their complaint without resorting to Rule 59(e), provided the Court is satisfied that such amendment satisfies the defects in the original complaint and would not be futile for any other reason. For the reasons stated below, the Court is satisfied that Plaintiffs should be allowed to file their amended complaint.

Pursuant to Defendant's June 12, 1995 motion to dismiss, the Court first observed that Plaintiffs had not alleged a facial challenge to the County's policy and were left to succeed or fail on an as applied challenge. The Court then determined that Plaintiffs lacked standing to bring an as applied challenge to the policy on behalf of their members under the three part test enunciated in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). When a suit is brought by an association such as NAHB, the Supreme Court has determined that the association may assert representational standing based on the rights of its members under the following conditions:

> An organization has representational standing when (1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343.

After applying this three-part test, the Court concluded that Plaintiffs failed to meet the third requirement because of potentially conflicting interests among their members and because the case by case analysis necessitated by an as applied challenge in these circumstances would require the participation of the individual members of the associations to demonstrate the specific constitutional violations.

In their amended complaint, Plaintiffs now purport to mount a facial challenge to the County's alleged policy. In dismissing the original complaint, the Court determined that Plaintiffs failed to raise a facial challenge to the policy because they had not alleged that the mere existence of the policy unconstitutionally affected the property rights of their members by adversely affecting property values and the opportunities of the market. *Beacon Hill Farm Assoc. v. Loudoun County Supervisors*, 875 F.2d 1081, 1083 (4th Cir. 1989).

In their amended complaint, Plaintiffs make the following allegations:

> 3. This action facially challenges the constitutional validity of the Policy maintained and enforced by Chesterfield County. Plaintiffs state that Chesterfield County's Policy is universally

> and routinely applied to residential rezoning applicants in violation of the United States Constitution, Amendments Five and Fourteen. There are no circumstances under which Chesterfield County could apply its Policy in a constitutional manner.
>
> * * *
>
> 12. The "mere existence of Chesterfield County's Policy with respect to cash proofers have injured all of Plaintiffs' members. Chesterfield County's Policy not only directly raises costs upon residential rezoning applicants and the builders who construct homes, but also interferes with the value of real property, generally creating artificial prices and discouraging needed development and progress.

Plaintiffs' Amended Complaint at ¶¶ 3, 12.

The Court is satisfied that these amendments to the complaint allow Plaintiffs to state a facial challenge to the alleged policy. The Court determines that Plaintiffs' ability to state a facial claim at this stage of the proceedings obviates the need for the participation of Plaintiffs' individual members to present proof of the alleged constitutional violations on a case by case basis. Accordingly, Plaintiffs may meet the third requirement of the *Hunt* test if they can satisfy the Court that there are no potential conflicts of interest among Plaintiffs' members.[2]

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[2] Moreover, the Court is of the opinion that the facial challenge asserted in Plaintiffs' amended complaint diminishes the concerns regarding ripeness issues that were raised by the Plaintiffs' original complaint.

As to the conflicts among their members, Plaintiff makes the following allegations in their amended complaint:

> 13. Chesterfield County's interference with the real property market affects all Plaintiffs' members. Distortion in real estate prices affects all developers and builders, residential or commercial. Furthermore, to the extent that Chesterfield County's Policy discourages, slows, or prevents residential development and the provision of affordable housing, the demand for other commercial and residential construction is lessened. Simply put, fewer people require fewer services, be it those provided by public or private entities. Moreover, Plaintiffs' members who provide services to the residential housing industry, be they subcontractors, suppliers, attorneys, or banks, depend upon a vibrant, thriving, and growing housing market. Thus, Chesterfield County's Policy detrimentally affects Plaintiffs' members across their extensive spectrum.

Plaintiffs' Amended Complaint at ¶ 13. Plaintiffs also allege that all of Plaintiffs' members "share a common goal of involvement in the housing industry and the provision of affordable housing throughout the country." Plaintiffs' Amended Complaint at ¶¶ 7, 8, 9.

In discussing conflict in its July 18, 1995 Memorandum the Court stated:

> The Court determines that in this case, according to Plaintiffs' own allegations, their members interests are too varied for Plaintiffs to be the appropriate vehicle to litigate this attack on the County's alleged policy.

* * *

> While the Court recognizes that this case does not present a particularly stark example of conflict, the Court is concerned that allowing Plaintiffs to represent their members in this lawsuit requires the Court to speculate extensively concerning the interests of Plaintiffs' members. Consequently, the Court concludes that Plaintiffs should not be permitted to represent the interests of certain of their members in federal court.

July 18, 1995 Mem. at 16-17.

While the Court is still somewhat concerned about the wide variety among Plaintiffs' many members, the Court determines that its concerns have been sufficiently alleviated to allow Plaintiffs to file their amended complaint. The Court reiterates that even before the proposed amendment to the complaint, the Court did not find the potential conflict among Plaintiffs' members to be "particularly stark"; however, the Court was unwilling to conclude that Plaintiffs had standing because of the additional participation necessitated by the individualized proof needed to succeed on an as applied challenge.

The Court now concludes that where conflict among members' interests stands alone as a bar to associational standing, there must be more actual or more concretely threatened potential conflict than can be inferred from Plaintiffs' amended complaint.[3]

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[3] The Court also notes that at least one other circuit has held that in order to prevent an association from asserting standing, the conflict must be direct and profound and there

Accordingly, the Court determines that Plaintiffs may file their amended complaint.

An appropriate Order shall issue.

/s/ Robert R. Merhige, Jr.
United States
District Judge

SEP 1 1995
Date

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may be other methods of remedying the conflict less drastic than dismissal for lack of standing. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 603-07 (7th Cir. 1993).

EXHIBIT 1

APPROVED ZONING CASES IN WHICH REDUCED OR NO CASH PROFFERS WERE OFFERED BY APPLICANT

	APPLICANT	ZONING CASE #	COMMENTS
1.	Betty Parker	90SN0177	Proffers not offered. Case approved.
2.	Long Meadow Farms	89SN0444	Case approved. Applicant proffered $1675 per lot.
3.	Carnes Braxton Retirement	90SN0289	Retirement community. No cash proffer for schools. Case approved.
4.	William & Gene Duval	92SN0167	Rezoning for two additional residential lots when combined with adjacent parcel. No cash proffer. Case approved.
5.	Larry Goldman	94SN0205	Retirement community. No cash proffer for schools. Case approved.
6.	C.C. Moore	91SN0227	No proffer on one lot. Case approved.

7.	Rivers Bend	95SN0109	Retirement community. No cash proffer for schools. Case approved.
8.	Moss	92SN0137	Proffers not offered. Case approved.
9.	Bonarco and Marchetti Assoc.	95SN0186	Rezoning permitting retirement community. No cash proffer for schools. Case approved.
10.	Chesterfield Redevelopment Associates	95SN0309	Rezoning permitting retirement community. No cash proffer for schools. Case approved.

Total rezoning cases approved since adoption of cash proffer policy: 41

Total rezoning cases approved with less than maximum cash proffers or with no cash proffers: 10

LEGAL CONSTRAINTS

1. Must adopt a local cash proffer ordinance providing for the acceptance of cash proffers (Cash proffer ordinance adopted August 1989).
2. Cash proffer can only apply to needs created by the new zoning, cannot apply cash proffers to existing costs or service deficiencies.
3. Amount of the cash proffer must be reasonably related to a capital need created by the rezoning.
4. Cash may only be accepted when the future improvements to be funded by the proffer are listed in the County's Capital Improvement Program.
5. If cash is not used for proffered purpose it must be returned to the applicant.

Defendant's
Exhibit
4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES

and

HOME BUILDERS ASSOCIATION OF VIRGINIA

and

HOME BUILDERS ASSOCIATION OF RICHMOND,

Plaintiff,

v. Civil Action No. 3:95CV402

CHESTERFIELD COUNTY, VIRGINIA,

Defendant.

AFFIDAVIT OF JAMES J. L. STEGMAIER

JAMES J. L. STEGMAIER, being first duly sworn, states as follows:

1. I am currently the Director of Budget and Management for Chesterfield County ("County").

2. My responsibilities include directing financial planning and debt management for the County, coordinating organizational and community strategic planning and managing fiscal impact analyses and cash proffers.

3. In 1989, the County amended its conditional zoning ordinance to authorize the acceptance of cash proffers based on the state enabling legislation.

4. Prior to 1989, residential growth and development had not provided any significant share of the costs to fund new growth-related public facilities. After analyzing the projected growth of residential development in the County and the existing capital facilities which were available to serve this new population, the County determined that revenues (taxes and fees) generated by growth would only cover the County's normal operating costs to provide services to these new residents and would not cover the costs of facilities needed to provide the services.

5. County staff decided that it would be necessary to develop a methodology to determine the appropriate maximum cash proffer contribution. A cash proffer committee ("Committee") was formed to help develop proposed methodology, facility costs and policies regarding acceptance of cash proffers. The 10-member Committee included the attorney for the Home Builders Association of Virginia, two representatives of the Home Builders Association of Richmond and several local developers. In addition, the Home Builders Association of Richmond hired a Bethesda, Maryland consultant named Paul Tischler who had performed fiscal impact analyses for other localities across the country and Dr. Robert Cook, an economics professor from the University of Richmond.

6. The Home Builders Association of Richmond informed the Committee that it had asked Tischler to develop a proposed methodology for the Policy. Tischler met with County staff members to obtain data for the proposed methodology and then presented his analysis to the Committee.

7. The Committee held several meetings with County staff and attended a retreat with the County's Board of Supervisors ("Board") on January 25-26, 1990 to discuss the proposed methodology. The purpose of those meetings was to receive input from the development community and insure that the County developed a policy which complied with the enabling legislation and legal requirements.

8. After extensive discussion among Board members, County staff and Committee members, a methodology was created which contained Tischler's proposed methodology with some modifications. This ultimately became the County's cash proffer policy ("Policy").

9. The final version of the Policy contained language, which the home building community supported, requiring a relationship between any cash proffer made by a developer of a residential development and the development itself. The purpose of this language was to insure that any cash proffers offered by a developer would be logically and legally defensible and would be supported by a written, published and rational methodology.

10. On February 14, 1990, the Board held a public hearing to consider the proposed cash proffer policy and on March 14, 1990 the Board adopted the Policy. The Board has amended the Policy at various times since 1990. The Board is given Exhibit 4 when it reviews the Policy.

11. The language of the Policy adopted by the Board provides guidelines for the Board to consider when an applicant proffers cash as part of a residential zoning case

and establishes a maximum cash proffer amount which the board can accept from an applicant.

12. The Policy is "applicable to all residential rezoning requests" and permits the Board to grant residential rezoning requests with a proffer that is below the maximum amount or with no cash proffer.

13. Cash proffers collected for a particular residential development are applied solely to public facilities which serve that development. All fire stations, parks and libraries serve all residential developments. Money for schools and roads will only be spent for those schools and roads within the service district or zone which serves the particular residential development.

14. The Board has considered forty-one cases since the adoption of the Policy for which cash proffers could be made. Of those cases, the Board has approved 10 with less than the maximum cash proffer or with no cash proffer. Exhibit 1 accurately describes these cases and the circumstances surrounding these cases.

15. The Board has denied requests for rezoning when the applicant offered the maximum cash proffer amount. On July 26, 1995, the Board voted unanimously to deny a request by Dean Ted Patrick to rezone approximately 74 acres from Agricultural (A) to Residential (R-9) despite the fact that Patrick proffered to pay the maximum cash proffer. Exhibit 3 is the certified minutes of the Board meeting at which this decision was made.

16. I am competent to testify to the matters sworn by me in this Affidavit. All statements sworn to by me in

this Affidavit are within my personal knowledge and I swear and certify that the statements are true.

JAMES J. L. STEGMAIER

/s/ James J. L. Stegmaier

COMMONWEALTH OF VIRGINIA;
COUNTY OF CHESTERFIELD, to wit:

I, Joy D. Beavers, a Notary Public in and for the Commonwealth and County aforesaid, do hereby certify that JAMES J. L. STEGMAIER, Director of Budget and Management for the Chesterfield County, whose name is signed to the foregoing Affidavit has acknowledged the same before me in my jurisdiction aforesaid and sworn that the information contained therein is correct to the best of his knowledge and belief.

Given under my hand this 31st day of October, 1995.

My Commission Expires: March 31, 1996.

/s/ Joy D. Beavers
Notary Public

Supreme Court, U.S.
FILED
DEC 6 1996
CLERK

No. 96-656

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE HOME BUILDERS ASSOCIATION OF VIRGINIA AND THE HOME BUILDERS ASSOCIATION OF RICHMOND,

Petitioners,

v.

CHESTERFIELD COUNTY, VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Counsel of Record*

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No. 96-656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE HOME BUILDERS ASSOCIATION OF VIRGINIA AND THE HOME BUILDERS ASSOCIATION OF RICHMOND,

Petitioners,

v.

CHESTERFIELD COUNTY, VIRGINIA,

Respondent.

PETITIONERS' REPLY BRIEF

Respondent offers three (3) reasons why this Court should not review this case. First, Chesterfield County argues that its Policy does not actually do what it purports to do, despite its language to the contrary, and that in any event, Chesterfield County may actually disregard its Policy on occasion. Second, Chesterfield County argues—contrary to the authorities presented—that there is no confusion or conflict concerning the application of *Dolan v. Tigard*, 114 S.Ct. 2309 (1994) in the lower courts. Third, and finally, Chesterfield County claims that the Policy is too "unique" for any review by this Court to be of value. As shown below, each of Chesterfield County's arguments fail.

A. THE POLICY IS FACIALLY INVALID

Chesterfield County relies upon the District Court's reasoning that there is no apparent reason why proffers required by the Policy cannot be determined in an "'individualized' manner" for its claim that the Policy complies with

Dolan.[1] Such reasoning begs the question, however, for neither the Policy's language or Chesterfield County's practice comports with *Dolan*'s requirement that an "individualized determination" be conducted to demonstrate the "rough proportionality" of the required proffers.[2]

First, the proffers are mandatory. That that is so is demonstrated by the Policy's language. It is also demonstrated by Chesterfield County's practice since on only one (1) occasion has a residential rezoning application been approved without the payment of proffers.[3] This single exception does not mean the Policy is constitutional; rather, this example merely demonstrates that on one occasion Chesterfield County failed to enforce its Policy.[4]

Second, *Chesterfield County does not make any sort of "individualized determination"*, but rather employs its "complex

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[1] *See* Respondent's Brief in Opposition ("Respondent's Brief") at 10; Petition for Writ of Certiorari ("Petition"), Appendix ("App.") at B6-7.

[2] Despite Chesterfield County's fervent denials, the Petitioners rely upon the Policy's language to support its claim that proffers are required and mandatory. *See* Petition at 15; App. at B3. Moreover, since Chesterfield County raises the issue of affidavits submitted below, it should be noted that all the numerous affidavits submitted by Petitioners stated unequivocally that proffers were mandatory as a condition for residential rezoning and that Chesterfield County *never* conducted *any* individual determinations to ascertain a proposed development's projected impact upon existing public services and infrastructure.

[3] Respondent's Brief at 10a.

[4] In order to survive a facial challenge, it must be shown that there are no circumstances under which the Policy could be applied consistent with the constitutional requirements set out in *Dolan*. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (plaintiff "must establish that no set of circumstances exist under which the Act would be valid."). Petitioners have made such a demonstration. *See* Petition at 14-19. It is of no consequence that in enforcing the flawed Policy, Chesterfield County might, on occasion, extract from a developer dedications which turn out to be "roughly proportional" to his development's impact. Such a result would not follow from the enforcement of the Policy, but rather would merely constitute a coincidence of fate. The Policy—as written and as enforced—is fatally flawed and unconstitutional.

methodology" which it claims is more than sufficient to calculate costs imposed by all new residential development.[5] This "one-size-fits-all" Policy is not constitutionally sound when it is used to calculate dedications to be required as a condition of property use. As this Court held in *Dolan*, "generalized statements as to the necessary connection between the required dedication and the proposed development" are constitutionally insufficient. *Dolan*, 114 S.Ct. at 2318. Certainly if this Court did not mean that determinations must be "individualized", then it would have used a different word. *Dolan*'s "individualized determination" requirement is a mandate, not merely a good idea. *Dolan*, 114 S.Ct. at 2319-20.[6]

B. CLARITY IS REQUIRED TO SETTLE CONFUSION IN THE LOWER COURTS WITH RESPECT TO *DOLAN*

As demonstrated in the Petition, certain clarifications are indeed needed to guide the lower courts in applying *Dolan's* requirements. Illustrative of the confusion below is the apparent concern by both the District and Circuit Courts in applying the *Agins v. Tiburon*[7] standard to this *Dolan* type challenge. Another example is the California Supreme Court's

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[5] *See* Respondent's Brief at 10. According to Chesterfield County, the methodology's complexity "ensures" that the proffers are "proportional". Respondent's Brief at 10, n.5. Indeed, "complex" does not equate with accurate and is certainly no guarantee of "rough proportionality".

[6] Chesterfield County makes two (2) other incorrect observations with respect to the "individualized determination" issue. First, while the Circuit Court analogized the "individualized determination" requirement to "exact proportionality" in its opinion, Petitioners' counsel *never* advanced that argument. *See* Respondent's Brief at 4. Second, Petitioners' counsel did not "charge" Judges Russell and Widener with anything. Respondent's Brief at 10. However, *as a matter of fact*, Petitioners' counsel states that both Judges Russell and Widener used the word "stupid" to characterize this Court's "individualized determination" requirement. That Respondent's counsel may not have heard the comments is irrelevant.

[7] 447 U.S. 255 (1980).

application of *Dolan* to a monetary exaction, but its refusal to apply *Dolan* to a legislative enactment which imposed similar dedication requirements. *See Ehrlich v. City of Culver City*, 911 P.2d 429 (Calif. 1996).[8]

Contrary to Chesterfield County's assertions, Petitioners have not tried to "manufacture a conflict among the courts ...."[9] Rather, Petitioners present three (3) areas which require this Court's attention.[10] The authorities cited in the Petition speak for themselves.

C. REVIEW OF THIS CASE IS APPROPRIATE

Chesterfield County argues that this case presents a unique factual setting, thus making further review inappropriate.[11] This argument ignores that the factual settings in *Dolan, Lucas v. South Carolina Coastal Council*,[12] *Nollan v. California Coastal Comm'n*,[13] *and First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[14] were also unique. The principles involved, however, as applied to these unique factual settings, are what necessitated this Court's review. The same is true of this case. Where, as here, the Circuit Court has repudiated this Court's mandates, and where there is confusion and conflict among the lower courts generally as to the proper application of *Dolan* in harmonious

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[8] Chesterfield County misrepresents Petitioners' use of, and argument with respect to, this case. *See* Respondent's Brief at 12, n.8. The Petition accurately represents the *Ehrlich* holding.

[9] *See* Respondent's Brief at 14.

[10] *See* Petition at 10-14. The 3 areas of concern 1) the misapplication of *Agins* to *Dolan* type cases; 2) the appropriate deference to be given to Fifth Amendment claims; and 3) the confusion concerning the application of *Dolan* to monetary exactions and legislative enactments.

[11] *See* Respondent's Brief at 14-16.

[12] 505 U.S. 1003 (1992).

[13] 483 U.S. 825 (1987).

[14] 482 U.S. 304 (1987).

fashion with this Court's other Fifth Amendment jurisprudence, review is appropriate. The Writ should issue.

Respectfully submitted,

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December 6, 1996